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Supreme Court of the United States

No. 198.

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17

OCTOBER TERM, 1928

ARTHUR J. KARNUTH, UNITED STATES DIRECTOR OF IMMIGRATION, AND CHARLES DREHER, INSPECTOR IN CHARGE UNITED STATES IMMIGRATION SERVICE, PETITIONERS,

v.

UNITED STATES OF AMERICA, ON THE PETITION OF PRESTON M. ALBRO, AN ATTORNEY, FOR MARY COOK AND ANTONIO DANELON, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

No. 198.

ARTHUR J. KARNUTH, UNITED STATES DIRECTOR OF IMMIGRATION, AND CHARLES DREHER, INSPECTOR IN CHARGE UNITED STATES IMMIGRATION SERVICE, PETITIONERS,

v.

UNITED STATES OF AMERICA, ON THE PETITION OF PRESTON M. ALBRO, AN ATTORNEY, FOR MARY COOK AND ANTONIO DANELON, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

Opinions Below.

The opinion of the District Court (R. 16) is printed on pages 30 to 40 of the Record. The opinion of the Circuit Court of Appeals (R. 49-53) is reported in 24 F. (2d) 649.

Jurisdiction of This Court.

The judgment sought to be reviewed was entered on March 12th, 1928. (R. 53.) Petition for certiorari was filed in this Court in June, 1928.

The jurisdiction of this Court to issue the writ prayed for is conferred by the Act of February 13, 1925, under section 240 (a) of the Judicial Code as amended.

Statement.

As shown by the return herein to the Writ, to which is attached the record of the Special Board of Inquiry, MARY COOK, is a British subject, residing in Canada, and desired on December 1st to enter the United States for the purpose of *seeking employment*.

ANTONIO DANELON is a native of Italy, but a citizen of Canada and a British subject, and desired on December 1st to enter this country for the purpose of *continuing his employment* at Niagara Falls, New York, where he had a position. Both are at present domiciled and intend to remain domiciled in the Dominion of Canada. Both were held by immigration officials when attempting to cross at the "*Peace*" Bridge, and examined by the Special Board of Inquiry on December 1st, and while in custody a writ of *habeas corpus* was issued by this Court. Later a second hearing was held before the Special Board of Inquiry, by virtue of a special order of the District Court on the ground that Mary Cook and Ontonio Danelon had not been given the right of counsel at the first hearing. The record of these inquiries is before the Court and discloses the fact that the aliens were refused admission to the United States on the ground that "they had no unexpired Consular Immigration

Visas, as required by the Immigration Act of 1924 and Rule 86," and from the decision of the immigration officials denying admittance to this Country on this ground, each of the aliens appealed.

The questions of fact were not disputed.

The questions of law were brought on for argument before the Hon. John R. Hazel, United States District Judge for the Western District of New York, and the Court held, folios 88-120 of the record herein:

(1) That a person entering the United States in the morning solely to work and to return in the evening to an adjoining foreign country is not a temporary visitor but is an immigrant,

(2) that even if that person is of British nationality, as are the Respondents herein, he is not protected by the Jay Treaty of 1794 and 1796,

(3) that the Jay Treaty, if effective, does not apply to British Nationals of other than Canadian birth, classified by Order 86 as immigrants, and seeking employment in the United States.

The errors assigned on appeal subsequently to the United States Circuit Court of Appeals were precisely to these points.

We believe that the learned District Court erred in its holding and that the opinion of the United States Circuit Court of Appeals in favor of the Respondents is right, and we urge upon this Court what we have urged below, as appears from our argument and brief herein.

Questions Presented.

The Court below decided that naturalized citizens of Canada or other British subjects domiciled therein are not immigrants within the meaning of Section 203, Title 8, U. S. C. A. of the Immigration Act of 1924, if coming into the United States to work or in search of work, without changing their domicile and removing to this country for the purpose of permanent residence.

That they had the right to enter the United States temporarily for business purposes and that they could not be excluded at the Border under General Order No. 86, effective July 1st, 1927, which, the Court below ruled, was issued without authority of law.

The Court held that the Jay Treaty of 1794, Article III, and the Explanatory Treaty Article of 1796, relating thereto, between the United States and Great Britain gives the right of free temporary passage across the Canadian border to His Majesty's subjects and to the citizens of the United States into the respective territories and countries of each.

It is this decision of the United States Circuit Court of Appeals in favor of the Respondents herein which the Petitioner seeks to have reviewed by this Court.

Attention of this Court is also called at this time to the fact that the said Jay Treaty was held to be valid and in full force and effect, a few days after the decision herein, in the case of United States *ex rel.* Diabo v. McCandless, on appeal March, 1928, Circuit Court of Appeals for the Third Circuit, Penna., as reported in 25 Federal (2nd), page 71.

The Solicitor General has stated the facts and the law of the case with commendable fairness. While we oppose his contentions, we agree with him that the position of the Petitioner herein is a weak one, and that the reasons for the opinion of the Court below are, as he says, well stated in the opinion of the Circuit Court of Appeals. We are also in accord when he states that the judgment of the Circuit Court of Appeals has much to support it, and that it is sustained by respectable authority.

We are also pleased to note that the Solicitor General concedes the important point in our favor that,—"if the provisions of the treaty pertinent thereto were not abrogated by war, the Immigration Act should not be construed to repeal the treaty, if that result reasonably may be avoided." (Page 12 of his Petition.)

The judgment of the Court below is founded upon two grounds; the Immigration Act standing alone and the Jay Treaty of 1794 and the Explanatory Treaty Article of 1796. Either point is sufficient to sustain the Court below, and we submit that the questions raised, having already been decided adversely to the contentions of the Petitioner by the judgments of two United States Circuit Courts of Appeal in Pennsylvania and the State of New York, do not possess sufficient merit to warrant a review by this Court.

We cannot conceive of this Court reversing the Court below in its conclusion based upon two entirely distinct and separate lines of reasoning. It follows that this judgment in all probability would be sustained. Therefore, we feel that nothing can be gained, neither to the petitioner nor to the United States at large, by a review in this Court, unless this Court should feel that the interests of the

United States require a more formal statement of its opinion herein than a denial of the petition for certiorari.

We rely upon and accept the facts and the law as set forth by the United States Circuit Court of Appeals in its opinion delivered in this case, in addition to the further material submitted in our brief herein, to support our contentions in opposition to those of the petitioner, and, in order to guide this Court in its final determination, we have reprinted our brief as submitted in the Court below, with some additional citations and references.

Argument.

POINT I.

General Order Number 86 is invalid and void as in contravention of the Immigration Acts.

(For the convenience of the Court, we will state at this time that italics in this brief are those of counsel, and that so far as possible, the references to sections of the statutes are to the United States Code Annotated.)

So far as material to the question involved herein, General Order Number 86, issued April 1st, and effective July 1st, reads as follows:

"1691

U. S. Department of Labor
BUREAU OF IMMIGRATION
Washington

No. 55479/537
55266/General April 1, 1927.

GENERAL ORDER No. 86

SUBJECT: Land border crossing procedure.

1. Hereafter aliens residing in foreign contiguous countries and entering the United States to engage in

existing employment or to seek employment in this country *will not be considered as visiting the United States temporarily as tourists, or temporarily for business or pleasure*, under any provisions of the Immigration Law which exempt visitors from complying with certain requirements thereof; that is, they will be considered as aliens of the '*immigrant*' class.

2. However, the following aliens of the said 'immigrant' class residing in foreign contiguous countries and who are now enjoying the border crossing privilege may continue so to enjoy it upon the payment of head tax, provided such head tax was assessible on aliens entering permanently at the time of original admission, and, provided further, that they are not coming to seek employment."

The exceptions following do not in any way affect the two aliens in behalf of whom this writ was issued.

In substance this rule requires British subjects, crossing daily for work, to obtain consular visas and classifies such persons as "immigrants," where heretofore, up to the present time, such persons have been classified as "non-immigrants."

Such authority as rests in the Department of Labor at the present time to make any such regulations is contained in Chapter 6, Title 8, Section 102, U. S. C. A., the material part of which reads as follows:

"The Commissioner General of Immigration under the direction of the Secretary of Labor shall have charge of the administration of all laws relating to the immigration of aliens into the United States, and shall have the control, direction and supervision of all officers, clerks, and employees appointed thereunder. He shall establish such rules and regulations, prescribe such forms of bond, reports, entries and other papers and shall issue from time to time such instructions *not inconsistent with law*, as he shall deem best calculated for carrying out the provisions of this section and sections."

As to the power to make regulations we refer the Court to The Parthian, C.C.A. N. Y., 1921, 276 Federal, 903, from which we quote head note 3:

> "While the Commissioner may make regulations to enforce the Immigration Act, it was not permissible for the department to make or proclaim regulations which were beyond the powers delegated by the Congress to the Commissioner, by Section 23 of the Immigration Act (Section 959)."

This case was decided in the Circuit Court of Appeals, Second Circuit in 1921.

We also call the Court's attention to the case of *Merkle et al. v. Paschkes*, 123 Misc. 203; 204 N. Y. Supp. 102, which holds in substance, and we quote from the head note:

> "The Commissioner General of Immigration exceeded his powers under Immigration Law, Section 23, in formulating the rule that no attorney shall demand or receive compensation exceeding $25 for appearing in behalf of the United States, or of an alien, or aliens constituting one family applying for admission unless authorized to do so by the department or officer in charge of the immigration station; hence the rule is invalid as being legislation."

The broad principle is enunciated that a legislative body may not delegate its powers but may authorize an executive officer to adopt reasonable rules to carry out legislation which *it* has enacted.

Is it not legislation as in contradistinction to a departmental rule to classify as an "immigrant" one whom Congress has classified as a "non-immigrant" clearly and emphatically?

It is true that the authority given by Section 24 of the Immigration Act of 1924 to pass regulations omits words "***not inconsistent with law.***" Their insertion is, of course, not necessary in any event, but the later sections of the

Act of 1924 state that such act is to be construed as supplemental to the Act of 1917.

It is our contention that this regulation, promulgated pursuant to said section is beyond the powers of the Commissioner General of Immigration, acting under the Secretary of Labor, in that it contravenes the purpose and intent of Section 203 (U. S. C. A.) and is beyond the powers delegated by Congress. Not only that, but as we shall show later, in effect it nullifies Article 3 of the Jay Treaty of 1794, between Great Britain and the United States, which we believe we can demonstrate to the Court has never been abrogated.

Section 203, Title 8, Chapter 6, (U. S. C. A.) reads as follows:

> "'IMMIGRANT' defined. When used in this Chapter the term 'immigrant' means any alien departing from any place outside the United States destined for the United States, except * * * (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure."

There is then presented the question of law, as to whether or not an alien desiring to cross daily for employment is an "immigrant," as contended by the Petitioners or a "non-immigrant" as contended by us. If, as we contend, the Respondents are not immigrants, then they were entitled to their discharge because they were held upon a "conclusion of law" which cannot be supported upon the evidence adduced at the hearing.

It is our contention that the aliens at bar are entering the United States "temporarily for business."

The Department of Labor maintains that "business" does not include the ordinary vocations of man, but includes

only trading and merchandising. With this contention we are at odds. We refer to the Court the definition of "business" in *Corpus Juris*, and other text books, and cases cited thereunder. We quote from *Corpus Juris*, Volume 9, under heading "Business":

> "That which occupies the time, attention and labor of men for the purpose of a livelihood or profit; that in which one engages for the purpose of livelihood, profit, or the like; that which occupies the time, attention and labor of men for the purpose of profit or improvement; that employment which occupies the time, attention and labor; employment, etc., etc."

and we refer to the cases cited in the foot notes thereunder.

Business, "a very comprehensive term which embraces everything about which a person can be employed"; again "that which occupies the time, attention and labor of men for the purpose of a livelihood or profit, but it is not necessary that it should be the sole occupation or employment." It embraces everything about which a person can be employed, *Flint v. Stone Tracy Co.*, 220 U. S. Rep. 107, 111.

Business, "a very comprehensive term which embraces everything about which a person can be employed": See 220 United States Reports, page 111; 31 Sup. Ct. 342; 55 L. Ed. 389.

See also *re* above

People v. Commrs. of Taxes of New York, pages 242, 244, 23 N. Y. Rep. and the case of,

The Parker Mills v. Commrs. of Taxes, 23 N. Y. 244.

Also

Brown v. German-American Title & Trust Company, 34 Atl. 335, 343; 174 Pa. 443.

(ALL ABOVE CASES GIVE SIMILAR DEFINITIONS OF WORD.)

Business means, occupation or employment, see

Olson v. Ostby, 178 Illinois App. 176.

"The employment which occupies the time, attention and labour."

(See

Adam v. Musson, 37 Illinois App. 503.)

"Business is a word of large signification and denotes the employment or occupation in which a person is engaged to procure a living."

See

Goddard v. Chaffee, 84 Mass. (2 Allen), 395, 79 Amer. Dec. 796.

"The word BUSINESS is of large significance and denotes the employment or occupation in which a person is engaged to procure a living."

See

Allen v. Commonwealth, 78 N. E. 287, 288;—188 Mass. 59, 69 L. R. A., 599 (quoting and adopting the definition in the case of

Goddard v. Chaffee, 84 Mass. (2 Allen), 395, 79 Amer. Dec. 796.)

The word "business" in its BROAD SENSE embraces everything about which one can be employed, and in its NARROWER SENSE it signifies *a calling for the purpose of livelihood or profit:*

See

Easterbrook v. Hebrew Ladies Orphan Society, 82 Atl. 561, 563; 85 Conn. 289; 41 L. R. A. (N. S.) 615.

The decisions of the Courts of England are to the same effect, and are in line with the United States cases.

See the case of *Smith v. Anderson*, (1880), 15 Chancery Division, 258, where Sir George Jessel, Master of the Rolls, said:

> "*Business* itself is a word of large and indefinite import; it is a word of extensive use and indefinite signification; anything which occupies the time and attention and labour of a man for the purpose of profit is business; the legislature could not well have used a larger word."

In this connection we call the Court's attention to that part of the opinion of the District Court where it is stated at folios 114 and 115 of the record herein: "Congress did not use the word 'business' in its broadest sense or in a sense including daily labor or an occupation trade or calling for hire. It had in view a restriction of the broad term, 'business' as is clearly manifest from the general scope and purpose of the act."

We respectfully submit that upon these definitions it must be held that an alien who enters in the morning to follow his vocation and returns in the evening has made a *temporary entry* within the meaning of the statute, for the purpose of business.

If the Court, notwithstanding these definitions considers the definition of "business" by Congress ambiguous, then the definition given in the statute fails and the Court must construe the term "immigrant" according to the most obvious import of the language used. We do not believe that it will be necessary for the Court to go so far as to construe the term "immigrant," but if it should find it necessary, we respectfully submit the following:

From Corpus Juris, volume 2, under "Aliens," definition:

> "Immigration is the removing into one place from

another; the act of immigrating; the entering into a country with the intention of residing in it, etc.

"IMMIGRANT is a person who removes to a country for the purpose of permanent residence."

FROM WEBSTER'S NEW INTERNATIONAL DICTIONARY OF 1926:

"One that immigrates; one that comes to a country for the purpose of permanent residence; to settle."

FROM FUNK & WAGNALL'S NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE: 1923:

"One who or that which immigrates; a foreigner who enters a country to settle there; one who removes from one place to another."

FROM CHAMBERS' TWENTIETH CENTURY DICTIONARY:

"to migrate or remove into a country; one who immigrates."

The Courts have construed the meaning of "immigrant" on many occasions.

One of the leading cases is *Moffitt v. United States*, 128 Federal, 375, page 380. We quote from this case:

"'Immigrate' means to move into a country for the purpose of permanent residence. An alien immigrant to the United States is an alien who comes or removes into the United States for the purpose of permanent residence, but aliens composing the crew of a vessel visiting our sea ports are in no sense immigrants.

"'Immigration' is the passing or removing into a country for the purpose of permanent residence. The legislation contained in the various statutes that have been passed, relating to immigration, is clearly directed against the immigration into this country of certain classes of persons who come in with the intent of entering into and becoming a part of the mass of its citizens or population."

The reason that the immigration officials are holding these aliens to be "immigrants" is solely the fact that the Secretary of Labor in conjunction with the Commissioner General of Immigration promulgated the General Order 86,

above referred to. That is, in accordance with the Order, these aliens are not to be considered as "visiting the United States temporarily as tourists" or "temporarily for business."

If an immigrant is a person who desires to change his domicile, then the aliens in whose behalf this writ is obtained *are not* "immigrants." ***Can it be assumed that Congress in defining the term "Immigrant" intended to do violence to the accepted meaning of the word and the obvious import of the language used? We think not.*** It is self-evident that an administrative official cannot by his own act change the definition of Congress. (We call attention again to the fact that the definition of "immigrant" in Section 203 is in substance—one who comes from without the United States to the United States *except* temporarily for business.) That aliens of this class are not immigrants was decided adversely to the Government in this District Court thirty-six years ago in the case of *U. S. v. Michigan Central R. R. Co.*, 48 Fed. 365, when the Government attempted to fine the Michigan Central Railroad Co. for bringing a telegraph operator into Niagara Falls, N. Y., from Canada, to work for the company at Niagara Falls. This case was a proceeding by the United States to recover a penalty from the Michigan Central R. R. Co. for alleged violation of the Contract Labor Law, based upon the fact that the railroad, at its Niagara Falls, N. Y., office employed a telegraph operator who resided in Canada, and that it had full knowledge of the fact that he did so reside.

The Contract Labor Law then, as now, prohibited the *immigration* into the United States of laborers under contract. There was no question that the employee, Mr. Blant,

resided in Canada and came to the United States to work. The question was whether the railroad had induced him to "*migrate*" to the United States under contract of employment. On this issue, the court said *verbatim:*

> "*Mr. Blaut was not an immigrant because he did not come here intending to acquire a permanent or a temporary home.*"

This is the condition under which the **commuters** on the Canadian border enter the United States; they return in the evening to their homes in Canada. It follows that the immigration authorities not only are wrong when they attempt *to classify* such people as "immigrants" but they are acting contrary to the decision of the Courts which decided the question adversely to them thirty-six years ago.

It seems to follow that General Order 86, which raises the same condition, should be dealt with in the same way as the complaint against the Michigan Central. The aliens in this case are "non-immigrants" under the Statute, and cannot be made "immigrants" merely by *departmental order*, contrary to the intent of the Act of Congress. It follows that the writ should be sustained on this point alone.

The exceptions stated in Rule 86, which Counsel for the Government contends ameliorates its apparent harshness, soften it in no way in the particular case of either of these Respondents, as they do not come within the exceptions.

The District Court referred on the argument herein to the question of the rule itself having provided an opportunity of six months for British subjects intending to *immigrate* into this country to secure the Consular Vise. This is true. When it was seen on or about November 28th that a great hardship was to be worked upon many British subjects

whose quota number did not entitle them to enter into the United States, an order was issued allowing them to cross pending the reaching of their number on the Quota List (this, as a matter of fact, retards others who are waiting) *but* it, in no way, applies to British subjects in Canada who do not desire to *immigrate*, but only desire the border crossing privilege to and fro. The Consular Vise and numerical limitation was never intended for the purpose of mere border crossing, and statements are required showing *an intention to change domicile*. Thus, those British subjects who have not a bona fide intention of a dwelling in the United States must either falsify or be deprived of the border-crossing privilege.

Bluntly put, General Order 86 classifies as an "immigrant" a person who under Section 203 U. S. C. A. was specifically made a "non-immigrant". This, we respectfully submit, is "inconsistent with the law" as provided in Section 102, and, in addition, has the momentous effect of violating a solemn treaty between Great Britain and the United States.

We have examined the Immigration Act with care, and we can find no word which indicates an intent on the part of Congress to override the provisions of any existing treaty with Great Britain. Unless there is such a clear intent found in the statutes, or even if the Court is in doubt on that subject, then all the provisions of the Jay Treaty may be brought before the Court as pertinent to this issue.

POINT II.

The Treaty between Great Britain and the United States, known as the Jay Treaty of 1794, prevents the exclusion of these aliens.

The Relators herein claim the right of free, temporary passage across the Canadian border under Article III of the Treaty of Amity, Commerce and Navigation of 1794, commonly called the Jay Treaty, and the additional, "Explanatory Article" of 1796, the pertinent portion of which reads as follows:

> **"It is agreed that *it shall at all times be free* to His Majesty's subjects, and to citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, *freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America (the country within the limits of the Hudson's Bay Company only excepted), and to navigate all the lakes, rivers and waters thereof, and freely to carry on trade and commerce with each other.*" '**

Note specially the above words, "it shall at all times be free," in contradistinction to word "freely" in later part of the clause.

By Article 28 of the Treaty of 1794, it was provided that the first ten articles of the Treaty were to be permanent. See Article 28, first line, which says: "It is agreed that the first ten (10) articles of this treaty shall be permanent." The other articles all expired by their own time limitation. (See Moore Digest of International Law, Vol. 5, page 372.)

***(For Jay Treaty of* 1794, *see Volume One* (1), *of "Treaties, Conventions, Agreements,"* 1776 *to* 1909, *by William M. Malloy, of the State Department at Washington, at pages* 590 *to* 606, *and pages* 607 *to* 609, *for the additional "Explanatory Article" of* 1796.)**

At this point we respectfully submit that if this Court should be in doubt as to whether or not the Act of Congress,

known as the Immigration Act, shows the slightest intention of nullifying, or is in any way inconsistent with the Jay Treaty, may we respectfully submit the following authorities governing the general proposition of whether or not an Act of Congress supersedes a previous treaty.

A treaty may supersede a prior Act of Congress, and an Act of Congress may supersede a prior treaty.

The Cherokee Tobacco Case, 11 Wallace, 616 at page 621.

It is not sufficient to urge against an Act of Congress that it conflicts with or violates a prior treaty. A treaty has no superior sanctity over an Act of Congress. (Head Money Cases, 112 U. S. 580.) It is true that Courts will be slow to assume that Congress intends to violate a treaty right. (*United States v. Mrs. Gue Lim*, 176 U. S. 459; *Chew Heong v. United States*, 112 U. S. 536); but in case of an *irreconcilable conflict* between an Act of Congress and a Treaty the last in date will prevail.

Hijo v. U. S., 194 U. S. 315, at page 324.

A Treaty is of equal force with Acts of Congress; Ex. P. Scherer, 195 Fed. 334.

Treaties the Supreme Law of the United States; see *U. S. v. Rauscher*, 119 U. S. 407; *Court v. Hawes*, 113 Bush. 697; *Blanchford v. State*, 10 Tax App. 627.

Treaties and Acts of Congress stand on an equal footing as the Supreme Law of the land; *General Electric Company v. Robertson*, cited in 21 Fed. (2nd) 214, 215.

If clear and explicit, an Act of Congress must be upheld by the courts even in contravention of express stipulations in an earlier treaty.

***Fong Yue Ting v. United States*, 149 U. S. 698 at page 720.**

This, we believe, is the leading case on this particular phase of the subject, and would be cited by the Government if the Government's Counsel could show any intent upon the part of Congress by the Immigration Act to abrogate this treaty, or this were a question of immigration. (We do not refer to Rule 86, which we hold not an Act of Congress.)

In that case it was stated, in the course of the opinion by Mr. Justice Gray:

> **"In our jurisprudence it is well settled that the provisions of an Act of Congress, passed in the exercise of its constitutional authority, on this, as on any other subject, *if clear and explicit*, must be upheld by the Courts, even in contravention of express stipulations in an earlier treaty."**

The Court will recall that this case dealt with the broad question of Chinese exclusion and the provisions of a previous treaty with China, and specifically with the registration of Chinese residents in this country. The burden was thrust upon the United States Supreme Court of sustaining the validity of an Act of Congress which the Chinese said was contrary to the provisions of a previous treaty with China. Since the ratification of that treaty, in certain states, the importation of Chinese labor had caused conditions to arise detrimental to the interests of the citizens of the States and of the United States. These aliens failed to conform to the customs of our country and the whole problem was one

of the ability of the two races to live congenially together in the same localities. It involved the question of *permanent domicile* within the United States. The Act of Congress in question did clearly show an intent to abrogate the provisions of a previous treaty, and was held to do so. A reading of the decision shows that the United States Supreme Court in that case had the underlying thought of *justification by the circumstances*. In this case we have no such question of social welfare to our inhabitants, for we are dealing with temporary entrance and exit from the country of our friends in Canada, and not with the problem of the permanent immigration of a foreign race who cannot for ages adapt itself to our life and customs, or we to theirs.

We further respectfully submit that repeals by *implication* are not favored, as shown in the case of *Johnson v. Browne*, 205 U. S. 309, at page 321, and Acts of Congress *are always to be construed so as to conform to the provisions of a treaty if it is possible to do so.*

United States v. Whiskey, 108 U. S. 491, at page 496.

Rights granted under a treaty will be held to be in force unless clearly annulled by an Act of Congress.

Cheung Sum Shee v. Nagle, 45 Sup. Ct. 539.

"The Immigration Act (8 U. S. C. A.), and Prussian Treaty of May 1st, 1828 (8 Stat. 378), should, if possible, be construed so that both can stand together and be given effect." *Hempel v. Weedin*, 23 Fed. Rep. (2nd) March 22nd, 1928, page 949, citing the *New Haven* case at page 955.

See also to same effect the case of *Powers v. Comly*, 101 U. S. Rep. 101.

Any possible theory by which both can be in force must be adopted, if a reasonable construction can be given to both.

Ward v. Race Horse, 163 U. S. 504.

In the case of *Whitney v. Robertson* (1888) 124 U. S. 190, at page 194, Mr. Justice Field said:

> "When the two relate to the same subject, the Courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either."

The quota act must be construed with the view of preserving treaty rights of aliens, unless they are clearly annulled. They are aliens entitled to enter in pursuance of a treaty.

Cheung Sum Shee v. Nagle (Cal.) 1925, 45 S. Ct. 539; 268 U. S. 336, 69 L. Ed. 985.

And in the case of the *United States v. Schooner Peggy* (1801), 1 Cranch, U. S. 103, 109, Chief Justice Marshall, pronouncing the decision of the Court, said:

> **"The Constitution of the United States declares a treaty to be the Supreme Law of the land. Of consequence, its obligation on the Courts of the United States must be admitted."**
>
> **"Where a treaty is the law of the land, and as such affects the rights of the parties litigating in Court, that treaty as much binds those rights, and is as much to be regarded by the Court as an Act of Congress."**

A Treaty is the law of the United States of which all courts, State and National, are to take judicial notice; *U. S. v. Rauscher*, 119 U. S. 407, 425.

The construction of a Treaty is for the courts, which are not bound by the construction of the executive or diplo-

matic branches of government; *Ex. P. Charlton*, 185 Fed. 880; aff. 229 U. S. 447, 449, 33 S. 945; (1912). *U. S. v.* Greene, 146 Fed. 766.

On this question of revocation, or rather, paralyzation of treaty rights by subsequent Congressional action it is interesting to read the opinion of the District Court for the Eastern District of Michigan, Southern Division, in the case of *Hiram Walker & Sons, Ltd., v. Lawson, Collector of Customs and Internal Revenue*, 275 Fed. 373. Therein Walker & Sons, Ltd., made an attempt to ship carloads of intoxicating beverages through United States territory under bond, and the two defendants attempted to prohibit them from doing so under the provisions of the Volstead Act. The claim was made that the Volstead Act prohibited such shipment. The Court states, at pages 376 and 377, verbatim:

> "It is another established and recognized principle of statutory construction that repeals by implication are not favored, and that a later statute will not be held to have impliedly repealed an earlier one, unless full effect cannot be reasonably given to both. *United States v. Lee Yen Tai*, 185 U. S. 213, etc.
>
> "It is equally well settled that a treaty between the United States and a foreign country will not be regarded as abrogated, and rights thereby created taken away, by a subsequent statute, by implication, unless an intention to that effect is clearly and unequivocally indicated by the necessary operation of such statute, it being presumed, until the contrary is plainly manifest, that Congress intends no interference with such treaty rights; and it is only where the provisions of a treaty and the terms of a later statute are in irreconcilable conflict, and can not both remain in force, that the former will be considered as impliedly repealed by the latter. *Chew Heong v. United States*, 112 U. S. 536, etc."

The right of Canadian citizens to pass and repass in the manner *allowed by the Jay Treaty*, and in which these

aliens attempt to pass and repass, has not been *expressly* taken away nor, *is* an intention to that effect indicated by the Immigration Act, as required by the decisions of the highest courts. The Jay Treaty and the Immigration Act are not inconsistent; both can be reconciled, the Immigration Act being made to apply to aliens generally, or aliens intending permanent entry, except those governed by the special provisions of the Jay Treaty, upon the principle that when dealing with similar matters a special act prevails over or overrides a general act, unless it is expressly and specifically declared otherwise. **The Jay Treaty is not an immigration matter at all, but is a mutual border-crossing right and entry privilege specially agreed upon by and between Great Britain and the United States in and for their own special interests.**

The United States Supreme Court, in the year 1823, had occasion to consider the question of whether the Jay Treaty was terminated by the war of 1812 between the United States of America and Great Britain, and decided it was not abrogated. This case is also referred to in *Hempel v. Weedin*, 23 Fed. Rep. (2nd) March, 1928, at page 955.

Society for the Propagation of the Gospel in Foreign Parts v. Town of New Haven, et al., 8 Wheaton, 464, 5 L. Edition U. S. Rep. 662.

The opinion of the Court was written by Mr. Justice Washington. Said the Court, at page 494:

> "But we are not inclined to admit the doctrine urged at the bar, that treaties become extinguished, *ipso facto*, by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace. Whatever may be the latitude of doctrine laid down by elementary writers on the law of nations dealing in general terms in relation to this subject, we are satisfied that the doctrine contended for

is not universally true. There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. If such were the law, even the treaty of 1783, so far as it fixed our limits and acknowledged our independence would be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning.

We think, therefore, that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but at most are only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace."

Professor Charles C. Hyde, formerly counsellor of the State Department at Washington, and now professor of International Law at Columbia in New York, in his work on International Law (1922), Vol. 2, page 93, says that the views of the Supreme Court of the United States in the above New Haven case, "*are believed to be an impressive enunciation of sound principle.*"

It is true that certain clauses of the treaty expired by their own limitations, but the first ten, it appears, were made permanent by a provision in Clause 28. (See Malloy, "Treaties and Conventions," Vol. 1, above referred to, and the note on page 580 thereof, at bottom of page, citing the foregoing New Haven case as the leading authority as to the effect of the War of 1812 on Treaties of United States with Great Britain and note at bottom of page 590.)

Bearing on this question, it is worthy of more than passing notice to remember that the United States Government has acquiesced in the crossing and recrossing border privileges, and they have been acted upon and in operation with the full knowledge of the United States Authorities, without objection, ever since the year 1794, and down to and including April 1st, 1927, or for a period of one hundred and thirty-three years. The United States Government has thus recognized the existence of that treaty and of the rights and privileges granted thereunder to all British subjects, and to citizens of the United States.

We also wish to point out that the Solicitor-General of the United States, in his petition and supporting brief for a writ of certiorari herein, on appeal to the Supreme Court of the United States, filed in June, 1928, referring to the Immigration Act of 1924, admits, on pages 9, 11 and 12, that: "For nearly three years after that Act was passed, aliens residing in Canada were allowed to cross daily to work, on the theory that they were not immigrants."

"It must be admitted that the decision below has much to support it, and the fact that the Department of Labor so construed the Act of 1924 from its passage until April 1st, 1927, is not to be overlooked."

We also respectfully submit that the *burden in this case is upon the Government to show that there was an intention by the passage of the Immigration Act to abrogate Article III of the Jay Treaty.*

At about the same time as the decision in the New Haven case and in the year 1830 there arose in England the case of *Sutton v. Sutton*, Volume 1 Russell and Mylne Re-

ports, page 675, where the Master of the Rolls, Mr. Justice Leach of the Court of Chancery, decided that the treaty of 1794 was still in full force and effect, and that the War of 1812 did not end or abrogate the treaty. He cites the New Haven case and says:

> "The relations which had subsisted between Great Britain and America, when they formed one Empire, led to the introduction of the ninth section of the Treaty of 1794, and, the privileges of natives being reciprocally given not only to the actual possessors of lands but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should not depend upon the continuance of a state of peace."

(Same case also cited by Professor J. B. Moore in his International Law Digest, Vol. 5, paragraph 779, pages 373, 374.)

In an official publication of the United States Government, known as the Treaties and Conventions between Great Britain and the United States 1776 to 1887, issued under the authority of the Forty-eighth Congress, second session, at page 1228, it is stated that treaties do not, *ipso facto*, become extinguished by war, and it refers to the New Haven case above mentioned as authority. Professor Wheaton, a leading American authority on International Law, and a former Minister to foreign countries for the United States Government, says the same thing; while Chancellor Kent, one of the greatest judicial authorities of the United States, points to Clause 10 of the Jay Treaty of 1794 as proving conclusively that the War of 1812 did not cancel that treaty, and also refers to the American and English cases above mentioned.

Professor Woolsey, International Law, 6th Edition (1897), 263, one of the foremost authorities in the United States, who held the chair of International Law at Yale University for thirty years, agrees that the treaty was not abrogated, and Professor John Bassett Moore, probably the most eminent outstanding authority on International Law today in the United States, now one of the judges on the Permanent Court of International Justice, says that Article 9 was not annulled by the War of 1812, and is one of the permanent clauses of the Jay Treaty. Moore says, Vol. 5, 382, 383:

> "It may be affirmed that the proposition that all treaties are extinguished or annulled by war is unsupported by authority at the present time."

See Volume 5 Moore's Digest of International Law (1906) pages 372, 376 to 380, 382, and his Article in Volume One of the Columbia Law Review at page 213, regarding the effect of war on treaties. In Volume 5 he said that the Jay Treaty, Article 10, also operated during the War of 1812, and survived that war. See also Chancellor Kent's Commentaries on International Law, which supports Judge Moore. Kent says (Abdys edition), pages 393 and 394:

> "The tenth (10th) article of the treaty between the United States and Great Britain, in 1794, may be mentioned as an instance of a stipulation made for war. It provided, that debts due from individuals of the one nation to those of the other, and the shares or moneys which they might have in the public funds, or in public or private banks, should never, in any event of war, be sequestered or confiscated. *There can be no doubt that the obligation of that article was not impaired by the War of 1812, but remained throughout that war*, and continued binding upon two nations, until they should mutually agree to rescind the article; for it is a principle of universal jurisprudence, that a compact cannot be rescinded by one party only, if the other

party does not consent to rescind it, and does no act to destroy it."

On April 23rd, 1898, upon war breaking out between the United States and Spain, the Spanish government issued a decree declaring, among other things, that all treaties were terminated with the United States. This included a treaty of the year 1795, which contained certain permanent clauses, and the United States refused to allow or recognize this contention by Spain. Mr. John B. Moore, who was then acting Secretary of State, sent a despatch in which he said: "If it were true that war abrogates such stipulations, they would be subject to the singular fate of ceasing to be in force whenever they should become applicable."

The result was that the permanent provisions of the 1795 Treaty remained in force, and were adhered to and carried out, and Spain did not abrogate it. (See Moore International Law, Vol. 5, pages 375, 376.)

Perhaps one of the most recent and striking examples of a determination of this question was the insistence of the United States Government that treaties were not abrogated by war, when this question arose after the war with Spain.

In 1899 the United States Government demanded that Spain carry out the terms of the Treaty of Madrid, of February 17, 1834, regarding payment of certain annual indemnities and claims of American citizens. Spain replied that the War of 1898 with the United States had terminated this old treaty. The United States Government answered that they refused to admit any such contentions, *because Spain's obligation under the treaty was made permanent*

and the United States Department of State informed Spain that the Treaty of 1834, *being perpetual* in its nature, was not terminated or affected by the War of 1898, and as a result all the payments were made by Spain under the treaty as demanded. Here is an instance where, by Article 29 of the Treaty of Madrid, of July 3rd, 1902, made after the war with Spain, and after the Treaty of Paris of 1898 was signed, in which no provision was made regarding existing treaties, it is declared that all treaties, agreements, contracts and conventions between the United States and Spain, prior to the Treaty of Paris of 1898, should be "expressly abrogated and annulled," with the exception of the 1834 Treaty. And in this instance treaties existing prior to a war were terminated by a new treaty over three years after the treaty of peace was signed at Paris in 1898. See Prof. George G. Wilson of Harvard University, International Law, 1927 Ed. 208 and 430; Hyde, International Law, Vol. 2, page 92; Moore, International Law, pages 377, 378, 379.

The United States Senate passed a Resolution on February 8th, 1919, requesting information as to the effect of certain proposed congressional legislation on any treaty rights then in force, and in answer to this resolution, the Acting Secretary of State, on March 27th, 1919, quoted Article III of the Jay Treaty of 1794 as one of the treaty provisions which might be affected by legislation giving preferential treatment to Americans or American ships.

Regarding this Article III, it was then stated that:

> "The treaty from which the above quoted article is taken contains no provision for abrogation; hence, agreement by the parties thereto would seem to be necessary effectively to accomplish its abrogation as an international agreement. No action has been taken by either government looking to abrogation."

In order to further show and prove our contention to be right, and that the Jay Treaty of 1794 is still in effect and exists as a living force, and that it is a most important document for both nations and their interests, we ask the Court to consider for a moment Article number 5 of the Jay Treaty, which says:

> "Whereas doubts have arisen what river was truly intended under the name of the St. Croix River, mentioned in the said Treaty of Peace, and forming a part of the boundary therein described; that question shall be referred to the final decision of commissioners to be appointed in the following manner, etc., etc., etc."

By this 5th clause or article of the Jay Treaty of 1794, which Article it will be remembered is one of the ten (10) permanent clauses of that Treaty, provision is made for the appointment of three commissioners to determine the St. Croix River, and in accordance with these provisions of the said 5th Article the Commissioners met at Halifax, in the Province of Nova Scotia, Canada, in March, 1798, and determined the River St. Croix, but left unsettled the place of its source; this was left in dispute until the year 1842.

(See "American Diplomacy, Treaties and Topics," at page 73 (1894); being a treatise by the late Professor Freeman Snow, formerly head of the Department of International Law and Diplomacy at Harvard University.)

Now, in the year 1842 a Treaty was entered into between Great Britain and the United States for the purpose among other things of settling and accurately defining the boundaries between the possessions of Great Britain in North America and the Territories of the United States.

This Treaty was concluded on August 9th, 1842, and proclaimed November 10th, 1842, and is known as the Webster-Ashburton Treaty.

By Article one (1) of that Treaty of 1842, the Treaty of Peace of 1783, and the Jay Treaty of 1794, are all treated as interdependent upon each other, and referred to and dealt with as valid and subsisting documents and still in full force and effect, and regarded as governing the final settlement, fixing, determination and location of the true boundary lines of the possessions of the nations referred to in North America, and as to the exact location of the said River St. Croix and the true place of its source.

In connection with the said boundaries and the St. Croix River, Article one (1) of the said 1842 Treaty declares, among other things, that:

> "It is hereby agreed and declared that the line of boundary shall be as follows: Beginning at the monument at the source of the River St. Croix as designated and agreed to by the commissioners under the fifth (5th) Article of the Treaty of 1794, between the Governments of the United States and Great Britain, etc., etc., etc."

Article one (1) of the 1842 Treaty also refers to, incorporates and uses the Jay Treaty of 1794 as one of the vital documents in a chain of evidence necessary to properly and accurately fix, locate, determine, and settle certain portions of the whole boundary line between the United States of America and the British Dominions and possessions in North America, under and by virtue of the Treaty of Peace of 1783 to which the Jay Treaty of 1794 and the Webster-Ashburton Treaty of 1842 refer, as will be seen by reference to the said Treaty Articles, and to the provisions of the said Treaty of 1842, Clause (1).

This shows conclusively that the Treaty of Peace of 1783, and the Jay Treaty of 1794, are necessary and vital parts of the later Webster-Ashburton Treaty of 1842,

in order to complete the boundary lines and determine the rights of each nation, and in regard to the said River St. Croix, and both Treaties therefore become embodied into and are treated and made living parts of the later 1842 Treaty, both by reference thereto and incorporation therein.

Note especially the words in the 1842 Treaty, Article one (1), which refer to the Treaty of Peace of 1783, and also to the words which say: "as designated and agreed to by the commissioners under the fifth (5th) Article of the Treaty of 1794."

Of what possible use, benefit or service could these references be if the Jay Treaty of 1794 were not still treated as permanently binding upon both nations, as it is in fact stated to be by express words both in the Treaty itself, and in the later 1796 Explanatory Treaty Article referred to herein?

These references show conclusively that the Jay Treaty must be looked at and read with and into the later 1842 Treaty in order to get the true meaning and settlement regarding the boundaries of the two nations and of the said River St. Croix.

If the Jay Treaty had ever been abrogated or nullified such references would be absurdities, and it is not a reasonable conclusion to arrive at under these circumstances, that the eminent statesmen who negotiated the 1842 Webster-Ashburton Treaty, after mature and considered deliberation between the two nations, based their determination and adjustment upon the terms and provisions of an abrogated and non-existent Treaty made between the same two great nations some years before.

On the contrary, it proves to a demonstration that the Treaty of Peace of 1873, and the Jay Treaty of 1794, were incorporated into and made a part of the Treaty of 1842, and were regarded by these statesmen as integral parts of and important links in the chain of evidence and settlement finally made and agreed upon regarding the fixing, location and final determination of the said boundaries between the possessions of the two nations on the continent of North America.

(For authorities and Treaties on this matter, see the Volume of Treaties and Conventions between the United States and other powers, 1776 to 1887, Washington Government Printing Office, 1889, page 433, and also see, "Treaties, Conventions, International Acts, Protocols and Agreements between the United States and other Powers, 1776 to 1909," by William M. Malloy, Volume one (1), pages 650 and 651 for 1842 Treaty, and references therein to the Treaty of Peace of 1783 and to the Jay Treaty of 1794; and see Snow, "American Diplomacy—Treaties and Topics," pages 82 and 83, for summary of the 1842 Treaty.)

From the foregoing, we believe that we are right in our contention that the Jay Treaty, in so far as its features were made permanent, by its own terms and provisions is still in full force and effect.

Private Correspondence.

Private correspondence concerning a treaty subsequent or prior to its negotiation is always of weight in determining the purpose of the treaty itself. The question whether a treaty is terminated in whole or part by war be-

tween the contracting parties has been the subject of much discussion.

It was discussed at considerable length in correspondence between John Quincy Adams, American Minister to Great Britain and the British Foreign Office in the year 1815-1816, with regard to the question of the effect of the War of 1812 between the United States and Great Britain upon the provisions of the third article of the Treaty of Peace of 1783, relating to the liberty granted to citizens of the United States to take fish in Canadian territorial waters and to use certain parts of the neighboring coasts for the purpose of drying and curing fish. In a note of October 30, 1815, from Lord Bathurst to Mr. Adams, Lord Bathurst, in contending that the treaty provisions just mentioned had been terminated by the War of 1812, said:

> "It has been urged, indeed, upon the part of the United States, that the treaty of 1783 was of a peculiar character, and that, because it contained a recognition of American independence, it could not be abrogated by a subsequent war between the parties. To a position of this novel nature Great Britain cannot accede. She knows of no exception to the rule, that all treaties are put an end to by a subsequent war between the same parties."

In the same note Lord Bathurst made the following statement, which does not seem to be entirely consistent with the statement just quoted:

> "It is by no means unusual for treaties containing recognitions and acknowledgments of title, in the nature of perpetual obligation, to contain, likewise, grants of privileges liable to revocation. The treaty of 1783, like many others, contained provisions of different characters—some in their own nature irrevocable, and others of a temporary nature. If it be thence inferred that, because some advantages specified in that treaty would not be put an end to by the war, therefore all

the other advantages were intended to be equally permanent, it must first be shown that the advantages themselves are of the same, or at least of a similar character; for the character of one advantage recognized or conceded by treaty can have no connection with the character of another, though conceded by the same instrument, unless it arises out of a strict and necessary connection between the advantages themselves. But what necessary connection can there be between a right to independence and a liberty to fish within British jurisdiction, or to use British territory? Liberties within British limits are as capable of being exercised by a dependent, as by an independent state, and cannot, therefore, be the necessary consequence of independence."

In his reply of January 22, 1816, Mr. Adams made the following statements:

"The position that 'Great Britain *knows of no exception* to the rule that all treaties are *put an end to* by a subsequent war between the same parties, appears to the undersigned not only novel, but unwarranted by any of the received authorities upon the laws of nations; unsanctioned by the practice and usages of sovereign states; suited, in its tendency to multiply the incitements to war, and to weaken the ties of peace between independent nations; and not easily reconciled with the admission that treaties not unusually contain, together with articles of a temporary character, liable to revocation, recognitions and acknowledgments *in the nature of perpetual obligation.*

* * *

On this point, the undersigned would refer Lord Castlereagh to *the tenth (10th) article of the Treaty of 1794* between the United States and Great Britain, wherein it is thus stipulated: 'Neither the debts due from individuals of the one nation to the individuals of the other, nor shares, nor moneys, which they may have in the public funds, or in the public or private banks, shall ever, *in any event of war*, or national differences, be sequestered or confiscated.' If war puts an end to all treaties, what could the parties to this

engagement intend by making it formally an article of the treaty? According to the principle laid down, excluding all exception, by Lord Bathurst's note, the moment a war broke out between the two countries this stipulation became a dead letter, and either State might have sequestered or confiscated those specified properties, without any violation of compact between the nations."

* * *

"The undersigned believes that there are many exceptions to the rule by which the treaties between nations are mutually considered as terminated by the intervention of a war; that these exceptions extend to all engagements contracted with the understanding that they are to operate equally in war and peace, or exclusively during war; to all engagements by which the parties superadd the sanction of a formal compact to principles dictated by the eternal laws of morality and humanity; and, finally, to all engagements which, according to the expressions of Lord Bathurst's note, are *in the nature of perpetual obligation*. To the first and second of these classes may be referred the tenth article of the treaty of 1794, and all treaties or articles of treaties stipulating the abolition of the slave trade. The treaty of peace of 1783 belongs to the third." American State papers. Foreign Relations, Vol. IV, pages 354-355, 357.

On the subject of whether or not Article III of the Jay Treaty is still in effect, we should like to present to the Court the decision in a very recently decided case, namely *United States ex. rel. Diabo v. McCandless*, 18 Federal (second series) 282, and on appeal, March, 1928, C. C. A. 3, in 25 Fed. (2d) 71. This involved the right of an Indian on a Canadian Reservation to come permanently into the United States. That involved not the right of a Canadian Indian, under the treaty, to come into the country temporarily, but permanently, and in the argument by the Government it was contended that if Article III of the Jay

Treaty was still unabrogated, that even then it would give no right to a Canadian Indian to come into this country *permanently*. The Court held that regardless of the Treaty the Indian had a right to come permanently and an appeal was taken by the Government from this decision, which decision the United States Circuit Court in Philadelphia has now sustained, and has also decided that the Jay Treaty, Article 3, is still in force and valid. (25 Fed. (2nd) 71).

In that case the Government took the view that Canadian Indians may come in temporarily but not permanently. We submit, however, that the decision in the *Diabo* case is right and that they may 'freely pass and repass,' and come and go as and when they please under the Jay Treaty, in common with all British subjects in Canada. That is exactly the position we take in the case of these Canadian white people, who are British subjects, and *we urge it as worthy of adoption by this court.*

The opinion of the District Court in this case states:

"At the time the boundary line between the United States and the now Dominion of Canada was fixed and located by agreement with Great Britain, the line was run in large part through what may be termed Indian territory in the sense of lands, the right of occupancy of which was recognized by both the contracting parties to be in the Indians. The boundary line to establish the respective territory of the United States and of Great Britain was clearly not intended to, and just as clearly did not, affect the Indians. It made no division of their country. THE JAY TREATY OF 1794 RECOGNIZED THIS FACT in the provision that THE INDIANS RESIDING ON EITHER SIDE OF THE LINE, which as between the United States and Great Britain was established as a boundary line, SHOULD BE UNAFFECTED IN THEIR RIGHT TO PASS THIS LINE AT WILL. It has been argued to us pro and con that this treaty was abrogated by

> the War of 1812. We do not see that the rights of the Indians are in any way affected by the treaty, whether now existent or not. The reference to them was merely THE RECOGNITION OF THEIR RIGHT, which was wholly unaffected by the treaty, EXCEPT THAT THE CONTRACTING PARTIES AGREED WITH EACH OTHER THAT EACH WOULD RECOGNIZE IT. The right of the Indians remained, whether the agreement continued or was ended. The question of the right of the Relator to enter the territory of the United States does not turn upon any treaty with Great Britain, although, of course, if we have an agreement to permit him to enter, we will make good our promise, unless it has been duly revoked."

Upon appeal in March, 1928, the above decision of the lower Court was affirmed, and the Jay Treaty of 1794 held to be in force: See 25 Fed. (2nd) 71 (C. C. A. 3).

We contend that the same right of freedom of passing and repassing across the boundary line, possessed by the Indians as mentioned in the above case, also applies to British subjects and citizens of the United States and all others exercising and entitled to this privilege and this right, under the Jay Treaty, which Treaty two United States Circuit Courts of Appeal have now decided to be valid and in force.

Abrogation Has Been Sought by Neither Party to the Treaty.

It would seem further that International Law and Practice require that the United States Government must first ask for the abrogation of the Jay Treaty before it can legally enforce the border regulations of Order 86 against

British subjects in Canada, who desire to exercise their rights under the treaty, which are, both in United States and Great Britain held to be still in force. More especially is this true where these rights and privileges have been exercised under that treaty for upwards of 133 years, since 1794, without objection, and acquiesced in during all that period of time by the United States authorities.

It is respectfully submitted that under such circumstances it will require the most clear and expressed words of abrogation, and the consent of both nations before it can be considered as abrogated, cancelled or annulled. We feel sure that the Court would welcome the statements of distinguished jurists on this question, and we, therefore, take the liberty of quoting from Honorable Shelby M. Cullom, a well-known United States jurist, and authority on International Law. He says:

> "It is true that the Supreme Court has held that an act of Congress may repeal a treaty, but such repeal would only be effective so far as our domestic law is concerned. The other nation would still have a right to consider us bound by our contract, and if the contract was broken on our part, it might lead to a declaration of war."—North American Review, Volume 180, No. 2, pages 335, 345.

Again, Mr. Bryce, the British Ambassador at Washington, in a communication to Mr. Knox, Secretary of State, on February 27th, 1913, stated in relation to the Act of Congress of August 24th, 1912, and the effect thereof upon the Hay-Pauncefote Treaty, as set out in Senate document No. 4741, 63rd Congress, 2nd Sess. 101:

> "His Majesty's Government conceive that International Law or usage does not support the doctrine that the passing of a statute in contravention of a treaty right affords no ground of complaint for the infraction of that right, and that the nation which holds that its

> treaty rights have been so infringed or brought into question by a denial that they exist, must, before protesting and seeking a means of determining the point at issue, wait until some further action violating those same rights in a concrete instance has been taken, which, in the present instance would, according to your argument, seem to mean, until tolls have been actually levied upon British vessels owned by citizens of the United States have been exempted."

Mr. Wu, the Chinese Minister, wrote to Mr. John Hay, the Secretary of State, on January 25th, 1899, as set forth in the Foreign Relations of the United States documents for 1899 at page 195, as follows:

> "However much the courts may feel bound to follow the legislation of Congress, I apprehend you will not contend that adverse legislation or the judgment of a domestic tribunal can release a government from its solemn treaty obligations."

Again on this subject, the Marquis of Salisbury addressed a communication to Mr. Welsh, on November 7th, 1878, as set out in Foreign Relations of the United States, 1878, at page 323; as also did Mr. Chang Yen Hoon, Chinese Minister to Mr. Blaine, Secretary of State, July 8th, 1889, Foreign Relations for 1889, at pages 132 and 133; and also Mr. Caleb Cushing, Minister to Spain, wrote to Mr. Fish, Secretary of State, on January 13th, 1877, Foreign Relations for 1877, page 492, where it is stated that:

> "The right of the nation to free itself from the burdens of a compact must rest in each instance on a more solid basis than the declaration of the Constitution with respect to the supremacy of the laws as well as treaties of the United States."

And Mr. Fish, Secretary of State, sent despatch to the United States Minister in China, in 1869, wherein he said:

> "You will make clear to the government to which you are accredited the settled purpose of the President

to observe with fidelity all treaty obligations of the United States."

(Foreign Relations of the United States, 1870, at page 303.)

These quotations have been submitted to the Court only on the larger aspect of the question. Of course, we insist in this case that there has not been any intent demonstrated by an act of Congress to abrogate the treaty, but that it is Rule 86 (which violates the treaty) as at present administered with the same effect as an act of Congress.

The express provisions of the Jay Treaty must be looked at, and treaty provisions must be so construed as to best conform to accepted principles of international law, and not in derogation of them. See *Villas v. Maridia* (1911), 220 U. S. 345, at pages 358 to 395.

The treaty is an entire contract, all its articles and provisions are dependent on each other, and have the force of conditions. Each clause of a treaty has the force of a condition.

The violation of any one article of a treaty, is a violation of the whole treaty; for all the articles are dependent on each other, and one is to be deemed a condition of the other; and a violation of any single article overthrows the whole treaty. Kent's Commentaries on International Law, (Abdy Edition) 392; Foulke International Law, (Philadelphia, 1920), Vol. 1, 444.

It is a general principle of construction with respect to treaties that they shall be *liberally construed* so as to carry out the apparent intention of the parties, to secure equality and reciprocity between them. See Mr. Justice Field's re-

marks in *Geofroy v. Riggs*, 133 U. S. 258, at page 271, and *in re Ross*, 140 U. S. 453, at page 475.

The Supreme Court of the United States is reluctant to construe an act of Congress as in violation of an existing treaty, and further than this there can be imputed to Congress no disposition or readiness to disregard the terms of the international agreements of the United States. See:

Ex parte Webb, 225 663, at page 683;
U. S. v. Mrs. Gue Lim, 176 U. S. 459;
Chew Heong v. U. S., 112 U. S. 536, at page 539;
Lem Moon Sing v. U. S., 158 U. S., at page 538.

In re Chin A. On, 18 Fed. 506, 9 Sawy, 343, the Court said:

> "Before the courts will impute to Congress an intention to violate an important article of a treaty with a foreign power, that intention must be clearly and unequivocally manifested, and the language of the statute must admit of no other reasonable construction."

In this connection we call to the Court's attention the case *in re Hermann Thomas*, 12 Blatchford, Circuit Court Reports, page 370, referred to also in *Terlinden v. Ames*, 184 U. S. Rep. 270, (1902), where the Court said:

> "Indeed, it is difficult to see how such a treaty as that between Bavaria and the United States can be abrogated by the action of Bavaria alone, *without the consent of the United States*."

It is also worthy of note that the preamble to the Covenant of the League of Nations gives it as one of the League's objects:

> "To achieve international peace and security by a scrupulous respect for all treaty obligations."

Even the Immigration Act itself contains numerous references to treaty obligations. For instance, Section 28

of the Act of 1924 (8 U. S. C. A. §224) subdivision "f," defines:

> **"The term 'immigration laws' includes this chapter and all laws, conventions and treaties of the United States relating to the immigration, exclusion or expulsion of aliens;"**

In the case of *Terlinden v. Ames*, 184 U. S. Rep. 270, decided in February, 1902, the late Chief Justice Fuller said:

> "But where sovereignty and the power to execute remains unimpaired, outstanding treaties cannot be regarded as avoided because of impossibility of performance."

In this case the decision *in re Hermann Thomas, (supra)*, is cited with approval, and the principles there laid down approved.

SCOPE OF ARTICLE 3, AND EXPLANATORY ARTICLE OF 1796.

It is respectfully submitted that Article 3 of the Jay Treaty of 1794 and the "Explanatory Article" of 1796 cover, include and embrace three outstanding, separate and distinct subjects of agreement and international contract. First, there is what is known as "*Amity*," or friendship, shown by giving British subjects and United States citizens the right freely to pass and repass, to come and go, cross and recross, to and fro, back and forth, as and when they please at all times, from one country to the other, freely without let or hindrance or interference by or from the officials of either country on either side of the line; then there is the right of *Navigation*, the right to go freely into the waters of each country as therein set forth.

And thirdly there is the right freely to carry on trade and commerce with each other.

In fact the very Title of the Treaty of 1794 is that of "Amity, Commerce and Navigation," three separate and distinct matters. "Amity and Friendship" is the ancient name for treaties providing simply for mutual intercourse and friendship. See Foulke, Inter. Law, (1920) Vol. 1, 425; and article in Vol. 18 Columbia Law Review, (1918) 426.

The plain intention and purpose, and the proper interpretation and legal effect of the said third Article of the 1794 Treaty and of the 1796 "Explanatory Article" is, to give amicable intercourse freely from, to and among the people of each country on both sides of the line or international boundary. It gives a general freedom of social business and friendly intercourse, and freedom of navigation, portage and passage for the people of both countries.

The subjects and citizens of each country are to be freely admitted into the other in order to cement friendship, and promote social and international intercourse, business, trade and commerce.

In further support of our contention that the Treaty of 1794 gives Respondents the rights which they claim thereunder, we wish to draw to the attention of the Court and cite the additional and further international agreement entered into in the year 1796, or two years after the Treaty of 1794 was concluded and signed, which agreement of 1796 is to be found in volume one (1), 1776 to 1909, pages 607 to 609, of the work entitled, "Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers," by Mr. William M. Malloy, of the Department of State, at Washington, D. C., U. S. A., and which is there entitled and set forth in the following language, terms, provisions and conditions:

"1796."

"EXPLANATORY ARTICLE TO THE THIRD ARTICLE OF NOVEMBER 19, 1794, RESPECTING THE LIBERTY TO PASS AND REPASS THE BORDERS AND TO CARRY ON TRADE AND COMMERCE.

"*Concluded May 4, 1796; Ratification advised by Senate May 9, 1796.*

"Whereas by the third article of the treaty of amity, commerce and navigation, concluded at London on the nineteenth day of November, one thousand seven hundred and ninety-four, between His Britannic Majesty and the United States of America, *it was agreed that it should at all times be free* to His Majesty's subjects and to the citizens of the United States, and also to the Indians dwelling on either side of the boundary line assigned by the treaty of peace to the United States, *freely to pass and repass*, by land or inland navigation, into the respective territories and countries of the two contracting parties, on the continent of America, (the country within the limits of the Hudson's Bay Company only excepted), and to navigate all the lakes, rivers, and waters thereof, and freely to carry on trade and commerce with each other, subject to the provisions and limitations contained in the said article;

"AND WHEREAS by the eighth article of the treaty of peace and friendship concluded at Greenville on the third day of August, one thousand seven hundred and ninety-five, between the United States and the nations or tribes of Indians called the Wyandots, Delawares, Shawanoes, Ottawas, Chippewas, Putawatimies, Miamis, Eel River, Weeas, Kickapoos, Piankashaws, and Kaskaskias, *it was stipulated that no person should be permitted to reside at any of the towns or the hunting camps of the said Indian tribes*, as a trader, who is not furnished with a license for that purpose under the authority of the United States; which latter stipulation has excited doubts, whether in its operation it may not interfere with the due execution of the third article of the treaty of amity, commerce and navigation; And it being the sincere desire of His Britannic Majesty and of the United States that this point should be so explained as to remove all doubts and promote mutual

satisfaction and friendship; And for this purpose His Britannic Majesty having named for his Commissioner, Phineas Bond, Esquire, His Majesty's consul-General for the Middle and Southern States of America, (and now His Majesty's Charge d'Affaires to the United States,) and the President of the United States having named for their Commissioner, Timothy Pickering, Esquire, Secretary of State of the United States, to whom, agreeably to the laws of the United States, he has intrusted this negotiation: They, the said Commissioners, having communicated to each other their full powers, have, in virtue of the same, and conformably to the spirit of the last article of the said treaty of amity, commerce and navigation, entered into this explanatory article, *and do by these presents explicitly agree and declare, that no stipulations in any treaty subsequently concluded by either of the contracting parties with any other State or nation, or with any Indian tribe, can be understood to derogate in any manner from the* RIGHTS *of* FREE INTERCOURSE AND COMMERCE, *secured by the aforesaid* THIRD ARTICLE *of the treaty of amity, commerce and navigation, to the subjects of his Majesty and to the citizens of the United States, and to the Indians dwelling on either side of the boundary line aforesaid; but that all the said persons shall remain at full liberty* FREELY TO PASS AND REPASS, by LAND OR INLAND NAVIGATION, INTO THE RESPECTIVE TERRITORIES AND COUNTRIES OF THE CONTRACTING PARTIES, *on either side of the said boundary line, and freely* to carry on trade and commerce with each other, according to the stipulations of the said third article of the treaty of amity, commerce and navigation.

"This explanatory article, when the same shall have been ratified by His Majesty and by the President of the United States, by and with the advice and consent of their Senate, and the respective ratifications mutually exchanged, shall be added to and made a part of the said treaty of amity, commerce and navigation, *and shall be permanently binding upon His Majesty and the United States.*

"IN WITNESS WHEREOF, We, the said Commissioners of His Majesty the King of Great Britain and the

United States of America, have signed this present explanatory article, and thereto affixed our seals.

"Done at Philadelphia this fourth day of May, in the year of our Lord one thousand seven hundred and ninety-six.

(SEAL) P. BOND.
(SEAL) TIMOTHY PICKERING."

We submit that the clear explanation and wording of the foregoing agreement settles, beyond all question, that the Respondents are entitled to freely pass and repass, come and go, at all times as and when they please, as we have before contended, across the international boundary line without any interference from government officials of either country.

It will be observed that the later international agreement of 1796 refers to the "rights of free intercourse," secured by the third article of the 1794 Jay Treaty. It again gives them the right to enter each country freely, on either side of the international boundary line, not only for the purpose of trade and commerce, but, as it says, for "free intercourse," and association of each of the peoples with each other.

The right to freely carry on trade and commerce, is another right which is also given to the people of each country, and in addition the right of free navigation is once more affirmed in this 1796 "Explanatory Article," as it is called.

It is further submitted that the reasons given in the early part of the foregoing new Agreement or "Explanatory Article" of 1796, as justification for its negotiation and signature by the United States and Great Britain, support the contentions of the Respondents herein beyond any further controversy, and it plainly states that it is entered

into to remove any doubt which may exist as to the rights of the people of each country to cross and recross the border. It is respectfully submitted that no further argument on this point is necessary as the matter is concluded in favor of the Respondents herein by virtue of the express language and terms of this 1796 international agreement or "Explanatory Article."

We would also specially draw the attention of the Court to the fact that the last paragraph of this 1796 Agreement between the United States and Great Britain makes the 1794 and this 1796 Treaty and Agreement, by express words, "permanently binding upon His Majesty and the United States."

What the Jay Treaty of 1794 and the "Explanatory Article" of 1796 mean, both to the citizens of the United States and of Canada.

The Jay Treaty is what may be called for the United States and Canada a sort of Charter of Rights for British subjects in Canada to enter the United States at all times freely, to pass into, repass out, as and when they please, to go from Canada into the United States, and from the United States into Canada, and for the citizens of the United States to go as and when they please into Canada. This going to and fro, crossing and recrossing, by the subjects and citizens of both countries, under clause three (3) of that treaty, *is at all times to be free*, and *freely, without hindrance, interference or obstruction by officials of either country, and is unlimited as to time and place of so passing and repassing at all times freely.*

It is intended to be, and is, a kind of freedom of mutual and national intercourse for the subjects and citizens of

both countries in order to become friendly, good mixers, enjoy fellowship, exchange ideas, to engage in business and become employed and to carry on trade and commerce, generally, and to work in all lines of business and endeavor, including that of navigation.

Instructions Prior to Negotiation of Treaty.

When Mr. John Jay was about to depart for Great Britain, in order to negotiate what afterwards became the 1794 treaty, he was given his instructions and a list of objects which he should try and accomplish and have placed in any treaty that might be arranged between Great Britain and the United States.

It will assist the Court to some extent, to have before it any essential clause from those instructions which might throw any light on the meaning of article three (3) of the Jay Treaty of 1794, and the 1796 agreement.

In a work entitled, "The Diplomacy of the United States" being an account of the Foreign relations of the country from the first treaty with France in 1778 to 1828, written by a Boston scholar of that day, Mr. Theodore Lyman, Jr., in two volumes, 2nd edition, (1828), in Volume One (1), at pages 192 to 193, are set out the instructions of the United States Secretary of State at that time to Mr. John Jay, for his guidance in attempting to negotiate the 1794 Jay Treaty with Great Britain.

In Clause One (1) of those instructions Mr. Jay is directed to endeavor to accomplish as one of his objects, the insertion in any such treaty of a stipulation to provide for,—

"RECIPROCITY IN NAVIGATION."

We submit for the consideration of this Court that Article number Three (3) of the concluded Jay Treaty of 1794, and the "Explanatory Article" of 1796, purports to carry out in some measure the instructions of Mr. Jay in this matter, as it applies to Canada under that article of the treaty, wherein by Article Three (3) it is expressly provided that:

> "*IT SHALL AT ALL TIMES BE FREE* to His Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the boundary line, &c., &c., * * * *FREELY* to pass and repass by * * * *inland navigation, and to navigate* all the * * * waters thereof."

This is again repeated, more clearly, in the 1796 "Explanatory" article referred to.

In Clause number Five (5) of his instructions, Mr. Jay is advised specifically that another of the objects to be attained by him should be that of having any treaty he might arrange provide for the:

> "EXEMPTION OF EMIGRANTS, AND PARTICULARLY OF MANUFACTURERS FROM RESTRAINT."

We might logically, and not without sound reason, contend that Article Three (3) of the concluded Jay Treaty of 1794, and the "Explanatory Article" of 1796, cover and provide for this direction in Clause Five (5) of Mr. Jay's instructions, when they give the passing and repassing right and privilege as therein set out. But, as neither of the parties to the Treaty had any desire to term or describe each others' border-neighbors in North America as "emigrants," it was considered better and wiser by both not to offend the

other's national pride or sensibilities and so it was arranged to use the less offensive and better language to accomplish the same purpose as it is found in Article Three (3). They thus permitted each country's subjects and citizens wide latitude of egress and ingress, passing and repassing from, into and out of each others' country in North America, and of coming and going, when and as they pleased, at all times.

It gives the subjects of Great Britain and the United States, on either side of the Boundary line the right *freely to pass and repass* from one country into the other, and declares that "*shall at all times be free*" for such peoples to go from one country to the other *freely*, not for trade and commerce only, *but freely at all times* without restraint.

These matters, it will be observed, are totally separate and distinct, and as we contend they all are separate and distinct in Article Three (3) of Treaty. The passing and repassing does not depend upon navigation, nor does it depend upon carrying on trade and commerce, nor does one depend upon the other, nor are they conditional upon each being made contingent upon the other for its operation. It might as well be contended that the reciprocal navigation part of Article Three is dependent upon the passing and repassing part, or *vice versa*, which would be absurd.

As further showing the relation of the instructions of Mr. John Jay to the completed Treaty of 1794, we draw the attention of the Court to Clause Ten (10) of the instructions, and compare it with Article 9 of the Jay Treaty, one of the permanent articles, which has been passed upon by the Courts also.

Clause Ten (10) of the instructions of Mr. Jay is set out on page 193 of the above book by Mr. Lyman, and it directs to Mr. Jay that:

> "The intercourse with England makes it necessary that the disabilities, arising from alienage in cases of inheritance, should be put upon a liberal footing, or rather abolished."

To the same effect is the history of this Clause Ten (10) as found in a volume entitled, "Treaties and Conventions between the United States and other Powers," (1776 to 1887), published by the Department of State at Washington in January, 1889, under the direction of Mr. John H. Haswell, where it is stated at pages 1237 and 1238 that:

> "the instructions to Mr. John Jay, in 1794, left it to the discretion of that Minister, whether the subject of a commercial treaty may not be broken to the British Ministry, and should that be done, the general objects which it should effect were enumerated; among those it is said;"

here follows Clause Ten (10) above set out.

At page 1238 of this same volume it is then authoritatively stated that:

> "The 9th Article of the Treaty of 1794 with Great Britain provides that British subjects then holding lands in the territories of the United States may continue to hold them, &c., &c., * * * and that neither they, nor their heirs or assigns, shall, so far as may respect the said lands and the legal remedies incident thereto, be regarded as aliens."

We submit that the foregoing statements clearly show another of the Jay Treaty articles conforming in essentials in some measure to the instructions of Mr. John Jay, and important evidence as to the meaning of the Treaty clauses.

A reference to the 1796 "Explanatory Article" is made on page 203 of the above mentioned book by Mr. Theodore Lyman, which merely states the fact that this additional article was added to the 1794 Treaty in the year 1796.

The Supplementary Agreement of 1796 is also Permanent.

We have referred in a previous part of this brief to the *New Haven* case, which embodies a judicial declaration, by the Supreme Court of the United States, of the principle that treaties stipulating for permanent rights, or purporting to be perpetual, or contemplating a state of war, do not cease on the occurrence of war, but are at most suspended while it lasts, and revive on the restoration of peace in default of contrary agreement, and the leading authorities agree with this conclusion.

The question whether a treaty or stipulation was intended to set up a "permanent state of things" must be judged in the light of the terms or stipulation, and the circumstances of each particular case.

In the present instance, however, of the Jay Treaty of 1794, and the "Explanatory Article" of 1796, there can be no reasonable basis for dispute because, by its express terms, *a permanently binding treaty is on record* in this case, *expressly declared to be "permanently binding upon His Majesty and the United States."*

As bearing directly on this aspect of the case for the Respondents herein we wish to cite what is said by Professor George G. Wilson of Harvard University in his book on International Law, (1927) 2nd edition, 430, where he states therein, in referring to the Respondents herein, makes the following statement:

> "Some treaties may revive *ipso facto* on the conclusion of a treaty of peace. The general principle was stated in 1823 by the United States Supreme Court":
>
> > "We think, therefore, that treaties stipulating for *permanent rights* and general arrangements and *professing to aim at perpetuity*, and to deal with the case of war as well as of peace, *do not*

> *cease on the occurrence of war, but are, at most, only suspended while it lasts;* and unless they are waived by the parties, or new and repugnant stipulations are made, *they revive in their operation at the return of peace,"* citing *Society for Propagation of Gospel v. New Haven,* (1823), 8 Wheaton 464, 5 L. Ed. 662.

Crandall on Treaties, Washington, 1904 Ed., page 242, says that treaties recognizing permanent obligations or aiming at perpetuity are at most only suspended during war, and cites Moore in Columbia Law Review, Vol. 1, page 213, *re* the 1834 treaty, suspended during 1898 Spanish War and continued afterwards. At page 241 also cites the *New Haven* and *Sutton v. Sutton* cases. See Crandall's 2nd Edition, 1916, to same effect.

Chancellor Kent, in his Commentaries on International Law (Abdys Edition), page 394 says:

> "In the case of the *Society &c. v. New Haven,* the Supreme Court of the United States would not admit the doctrine that treaties became extinguished *ipso facto* by war, unless revived by an express or implied renewal on the return of peace. Such a doctrine is not universally true. Where treaties contemplate a permanent arrangement of national rights, or where, by their terms, they are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. They revive at peace, unless waived, or new and repugnant stipulations be made, and see *Sutton v. Sutton,* 1 Russ. and Mylne, 663, where the same principle is maintained in an English court of chancery."

It will be observed that the *New Haven* case, and that of *Sutton v. Sutton,* are cited and set out as leading cases by all the outstanding and recognized authorities in the field of international law, such as Professor James Brown

Scott, of the Carnegie Institute, in his book of leading cases on international law, 1st edition (1902), pages 427, 428; and in his 2nd edition (1922), pages 93, 468; by Professor Charles C. Hyde, of Columbia University, in his work on "International law as applied and interpreted by the United States," (1922), 2 Volumes; by Professor George C. Wilson of Harvard University in his books on international law, 2nd edition (1927), by Professor Charles G. Fenwick of Bryn Mawr College, in his principles of International Law, (1924), 444, 468; and in Evans Leading cases on International Law, Boston, (1917), 235, 240, (1922), 398; in addition to their authority as settled by the United States Supreme Court, and by the Courts in England.

Professor Pitt-Cobbett in his leading cases on International Law, 4th Ed. (1924), Vol. 2, page 44, says:

> "The New Haven case embodies a judicial declaration of the principle that treaties stipulating for permanent rights, or purporting to be perpetual, or contemplating a state of war, do not cease on the occurrence of war, but are at most suspended while it lasts, and revive on the restoration of peace in default of contrary agreement, and with this conclusion both the doctrine of the English Courts as shown by *Sutton v. Sutton*, 1 R. & M. 363, and the present international practice may be said to agree."
>
> "The question whether a treaty or stipulation was intended to set up a 'permanent state of things' must be judged in the light of the terms of the treaty or stipulation, and the circumstances of each particular case."

Professor Norman Bentwich, in his leading cases on International Law, (1913), at page 150, referring to the *New Haven* case, and *Sutton v. Sutton*, says:

> "These two decisions, one of an English and the other of an American tribunal, show that war does not put an end to the effect of all treaties between the belligerent countries, though it may suspend their operation during the hostilities."

The Treaty—Convention of 1815.

A short reference to the above Convention will help to further explain the Jay Treaty of 1794, and the additional "Explanatory Article" of 1796.

On July 3rd, 1815, a new Convention, or Treaty Agreement, to regulate commerce and navigation between Great Britain and the United States was concluded and signed, and ratifications were exchanged at Washington on December 22nd, 1815.

This agreement was to last for four (4) years, but it was extended for ten (10) years by the Treaty of October 20th, 1818, and further indefinitely extended by a Convention of August 6th, 1827, subject to twelve months' notice of abrogation.

Regarding the present position of this Treaty-Convention, showing it to be still in force and effect, Senator Elihu Root, formerly United States Secretary of State, in his argument before the Permanent Court at The Hague in 1910, on the Fisheries Arbitration, referred to this 1815 Convention, incidentally, as follows:

> "The kind of right which was granted in the treaty of 1815, that treaty which was continued by the treaty of 1818, and which, I may observe, was again continued in 1827, and is the treaty under which we live today, to travel and reside."

The above Convention of 1815 will be found on pages 624 to 627 of Malloy's Treaties, Conventions, &c., Vol. 1, (1909), and also in a work by the late Professor Freeman Snow, of Harvard University, entitled: "Treaties and Topics in American Diplomacy," Boston, (1894), at page 76.

It will be remembered that all the articles of the Jay Treaty of 1794, except the first ten, expired by the time limitation stated in the treaty, and by the year 1807 all the articles, from number eleven inclusive to twenty-seven (27), had lapsed in accordance with the provision of article numbered 28 regarding this matter

This Treaty-Convention of 1815 gives the people and inhabitants of His Majesty's territories in Europe full liberty and freedom to come, with their ships and cargoes, to all the United States territories in America, and permits them to reside there indefinitely, and to build houses for themselves, a similar privilege was given United States citizens.

By this Convention a number of the important articles of the Jay Treaty of 1794, which had expired under the time limitation of Section 28 of that Treaty, were revived and their essential parts again brought into force.

There was no necessity, however, to deal with the first ten (10) articles of the Jay Treaty, because they had already been made permanent and, so far as Canada was concerned, article three (3) of the Jay Treaty gave that country what was now being given to Great Britain and the United States under this new 1815 Convention, and which was previously enjoyed under the old expired clauses of the 1794 Treaty. For instance, Article one (1), and (2), of the 1815 new treaty-convention can be compared with, and are similar to, clauses (14) and (15) of the 1794 treaty.

Article (3) is similar to clause (13) of the 1794 treaty, article (4), referring to Consuls, compares with clause 16 of the 1794 treaty. But the most important article of this 1815 Convention for our argument is the last clause of ar-

ticle two (2) which, we contend, also preserves all our rights under article three (3) of the Jay Treaty of 1794, and the "Explanatory Article of 1796." The last clause of article number two (2), of the 1815 Convention, reads as follows:

> "*The intercourse between the United States and His Britannic Majesty's possessions* in the West Indies, and *on the Continent of North America, shall not be affected by any of the provisions of this article, but each party shall remain in the complete possession of its rights, with respect to such an intercourse.*"

INTERPRETATION OF TREATY OF 1794 AND "EXPLANATORY ARTICLE" OF 1796.

The principles of interpretation which should be applied specifically to the Jay Treaty of 1794 were enunciated in clear and unambiguous language by the Supreme Court of the United States, through Mr. Justice Story, in the case of *Shanks v. Dupont*, 3 Peters, 242, and 250; 8 Curtis' Decisions of Supreme Court of the United States, 395 and 400, (1830), where it is said:

> "*It seems to us, then, that all British born subjects ought, upon general principles of interpretation, to be held within the intent, as they certainly are within the words, of the Treaty of 1794.*"
>
> "*If the treaty admits of two interpretations, and one is limited and the other liberal, one which will further and the other exclude private rights, why should not the most liberal exposition be adopted*"?

In addition to the above we submit that the following cases should be applied, as setting forth the proper rules to be followed, in arriving at the true meaning and interpretation of the Treaty of 1794 and of 1796:

In the case of *Tucker v. Alexandroff* (1902), 183 U. S. 424, 22 S. Ct. 195, 46 L. Ed. 264, the broad basis of interpretation was stated by the Supreme Court of the United States as follows:

Mr. Justice Brown:

"As treaties are solemn engagements entered into between independent nations for the common advancement of their interests and the interests of civilization, and as their main object is, not only to avoid war and secure a lasting and perpetual peace, *but to promote a friendly feeling between the people of the two countries, they should be interpreted in that broad and liberal spirit* which is calculated to make for the existence of a perpetual amity so far as it can be done without the sacrifice of individual rights or those principles of personal liberty which lie at the foundation of our jurisprudence."

Mr. Justice Brown, at page 437, also said:

"The treaty should be interpreted in a spirit of *uberrima fides*, and in a manner to carry out its manifest purpose."

In the cases of *Sullivan v. Kidd* (1921), 254 U. S. 433, 41 S. Ct. 158, 65, L. Ed. 344; and *Missouri v. Holland* (1920), 252 U. S. 416, 40 S. Ct. 382, 64 L. Ed. 641, 11 A. L. R. 984; the Supreme Court said:

"Writers of authority agree that treaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals and are to be executed in the utmost good faith, with a view to making effective the purposes of the high contracting parties; that all parts of a treaty are to receive a reasonable construction with a view to giving a fair operation to the whole."

It is a well-settled rule, laid down by the Supreme Court of the United States, in the case of *Hauenstein v. Lynham* (1879), 100 U. S. Rep. 487; 25 L. Ed. 628, that:

"*Where a treaty admits of two constructions*, one restricted as to the rights that may be claimed under it, and the other *liberal, the latter is to be preferred.*"

And see the case of *Adams v. Akerlund,* 168 Illinois 632, 638; 48 N. E. 454 (1897), where *Hauenstein v. Lynham, supra,* and other leading cases are collected and cited to the same effect on the interpretation of treaties.

Professor Chas. C. Hyde, formerly counsellor of the Department of State at Washington, and now of Columbia University, in his work on "International Law, as interpreted and applied by the United States" (1922), Vol. 2, page 63, says:

> "The ascertainment of the sense in which terms have been employed in a treaty involves a search for sources of interpretation. These may be found in what is extrinsic to the agreement."

The use of whatever sheds light on the question involved is not restricted by prohibitive rules such as those in which the common law abounds. As Professor Westlake has well said: "The important point is to get at the real intention of the parties, and that inquiry is not to be shackled by any rule of interpretation which may rest in a particularly national jurisprudence, but is not generally accepted in the civilized world."

And on page 65 Professor Hyde sets out the submissions of counsel for both Great Britain and the United States, in the proceedings before the Alaska Boundary tribunal arbitration, as to the proper rules of construction and interpretation of that treaty dispute as follows:

For the United States it was said that: "the United States asserts that the intention of the parties to the treaty is vital to its true interpretation; that such intention between the nations is the very essence of the agreement; and that any material variance from the intention must give place to an interpretation in accordance with it."

For Great Britain it was said that: "the function of the tribunal is to interpret the Articles of the Convention by ascertaining the intention and meaning thereof and not to recast it. Any consideration showing that the words of the treaty must have been intended to bear a particular meaning, being a meaning which they are in themselves capable of bearing, may, of course, be legitimately presented."

In the case of *Marryatt v. Wilson*, 1. Bosanquet & Puller Rep. 435, 436, cited by Professor Hyde, Chief Justice Eyre said:

> "We are to construe this treaty as we would construe any other instrument, public or private. We are to collect from the nature of the subject, from the words and from the context, the true intent and meaning of the contracting parties, whether they are A and B, or happen to be two independent States."

And Mr. Alexander Porter Morse, the United States Arbitrator in the *Van Bokkelen* case, under a treaty regarding the United States and Haiti, of the year 1888, in giving his opinion said, that the case of:

> "*Marryatt v. Wilson* is strong authority for the proposition that *the municipal tribunals of the country may not nullify the purpose and effect of treaty language by imposing upon it a cramped, narrow, and forced construction.*" Cited by Hyde, Vol. 2, page 67.

The above cases of *Marryatt v. Wilson*, and *Van Bokkelen* are also cited on pages 451 and 452 of Scott's leading cases on International Law, 1922 edition.

The Supreme Court of the United States has laid down certain principles of Interpretation in connection with Treaties between Nations.

In the case of *Geofroy v. Riggs*, in 1890, 133 U. S. 258, 271, 10 S. Ct. 295, 33 L. Ed. 642, that Court said:

Mr. Justice Field:

> "It is a general principle of construction with respect *to treaties that they shall be liberally construed*, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. *And it has been held by this court that, where a treaty admits of two constructions, one restrictive of rights that may be claimed under it, and the other favorable to them, the latter is preferred.*"

And see the language of the same judge, Mr. Justice Field, in the case of *in re Ross & McIntyre*, 140 U. S. Rep. 453, 475, where the previous case of Geofrey v. Riggs is referred to as authority on treaties.

The British Appellate Court in England, known as the Judicial Committee of the Privy Council, referring to the interpretation of the Sixth Hague Convention, 1907, Status of Enemy Merchant Vessels at the Outbreak of Hostilities, said, in the case of *The Blonde* and other Ships (1922), 1 App. Cases, P. C. 213:

> "In construing such an international instrument as that now in question, it is profitable to bear in mind from the outset sundry considerations, which are not the less important for being doubtless somewhat obvious. It results from deliberations among the representatives of many powers, in which none can expect without some concession to insist upon his country's interests, its language, or its law. It is expressed in what is by tradition the common language of international intercourse, but it would be unreasonable in

the circumstances to expect of it either nicety of scholarship or exactitude of literary idiom. Neither the municipal law nor the technical terms of the negotiating countries can be expected to find a place in its provisions. Where interests conflict, much must be allowed to the effects of compromise; where the principles, by which future action is to be guided, are laid down broadly, leaving to the powers concerned the actual measures to be taken in execution of those principles, it is unreasonable to expect a greater precision than the circumstances admit of, or to reject as incomplete provisions which are expressed without much detail and sometimes only in outline.

"On the other hand, it is specially necessary to discover and to give effect to all the beneficient intentions which such instruments embody and which their general tenor indicates. *It is impossible to suppose, whatever the imperfections of their phrasing, that the framers of such instruments should have intended any power to escape its obligations by a quibbling interpretation, by a merely pedantic adherence to particular words, or by emphasizing the absence of express words, where the sense to be implied from the purport of the convention is reasonably plain.* Least of all can it be supposed that His Majesty's Government could have become parties to such an instrument *in any narrow sense*, such as would reserve for them *future loopholes of escape from its general scope.*"

In the case of *United States v. Ferris, et al.*, and *Lane v. Stone*, 19 Fed. (2nd) (1927), 925, Judge Bourquin, in giving judgment, said that:

> "A decent respect for the opinion of mankind, national honor, harmonious relations between nations, and avoidance of war, require that the contracts and law represented by Treaties shall be scrupulously observed, held inviolate, and in good faith precisely performed—require that Treaties shall not be reduced to mere 'scraps of paper'."

THE JAY TREATY OF 1794 WAS RECOGNIZED AS BINDING AND HELD TO BE IN FORCE AND DECISIVE OF THE QUESTIONS RAISED IN THE FOLLOWING CASES, AT THE TIMES AND DATES STATED, AFTER 1794 AND 1812.

Fitzsimmons v. Newport Ins. Co., 4 Cranch, 185; 2 Curtis U. S. 65, 69, *(1808)*:

"Condemnation of a neutral vessel for the intent to enter a blockaded port—considered in 1808 under provisions of the Treaty of 1794 by Chief Justice Marshall."

Fairfax v. Hunter, 7 Cranch, 603, 627; 2 Curtis U. S. 684, 691, 692, *(1813)*:

"Ejectment action involving those claiming rights under the Treaty of 1794."

Judge Story:

"For we are well satisfied that the treaty of 1794 completely protects and confirms the title of Denny Fairfax."

Jackson v. Clark, 3 Wheaton, 1; 4 Curtis Decisions, U. S. 153, *(1818)*:

"C. J. Marshall held that under Art. 9 of the Treaty of 1794 between the United States and Great Britain, British subjects, etc., may continue to hold land, etc. Defendant continued to be a British subject and he is entitled to hold and devise the land in question under that Treaty."

Craig v. Bradford, 3 Wheaton, 594; 4 Curtis U. S. 305, 308, *(1818)*:

"Judge Washington held that a defeasible title, etc., is completely protected and confirmed by the 9th Article of the Treaty of 1794, between the United States and Great Britain."

(Confirms *Fairfax v. Hunter* case.)

Orr v. Hodgson, 4 Wheaton, 453, 464; 4 Curtis U. S. 442, 443, 445, *(1819)*:

"Discusses the question—Who are heirs—under the 9th Article of the Treaty of 1794."

Story, J., referring to the Treaty of 1794, said:

"By the express terms of the treaty, it might lawfully pass to her heirs."

Shanks v. Dupont, 3 Peters, 242, 250; 8 Curtis Decisions of Supreme Court of U. S., 395, 400, *(1830)*:

"A woman, a citizen of Charleston, S. C., who married a British officer with whom she went to England in 1782 and remained there till her death in 1801—is a British subject within the purview of the 9th Article of the Treaty of 1794 with Great Britain."

Story, J.:

"The question arises whether she and her heirs are not within the purview of the 9th Article of the Treaty with Great Britain of 1794. It appears to us that they plainly are."

"Now, Mrs. Shanks was at the time a British subject, and she then held the lands in controversy; she is therefore, within the words of the Treaty. Why ought she not also to be held within the spirit and intent?"

"*If the treaty admits of two interpretations, and one is limited and the other liberal, one which will further and the other exclude private rights, why should not the most liberal exposition be adopted?*"

"*It seems to us, then, that all British born subjects ought, upon general principles of interpretation, to be held within the intent, as they certainly are within the words, of the Treaty of 1794.*"

Blight's Lessee v. Rochester, 7 Wheat, 535; 5 Curtis Decisions of Supreme Court of U. S., 316, 319, *(1822)*:

"The treaties of 1783 and 1794 only provide for titles existing at the time those treaties were made, and not to titles subsequently acquired, etc."

The Society for the Propagation of the Gospel in Foreign Parts v. The Town of New Haven and Wm. Wheeler, 8 Wheaton, 464, *(1823)*:

"Under the Treaty of 1783, the property of such corporation as plaintiff is protected the same as that of an individual and title thus protected is confirmed under the Treaty of 1794, so that it could not be forfeited by any intermediate legislative act, or other proceedings, for the defect of alienage. Strong judgment that the treaty of 1794 still is in force."

In the following case, the 2nd and 9th Articles of the Jay Treaty, 1794, were discussed and declared to be binding. ***Forsyth v. Reynolds,*** 15 Howard, 358, 20 Curtis Decisions U. S., 561, *(1853)*:

"Lands granted by the Act of March 3rd, 1807, in fulfilment of the 2nd Article of the Treaty of 1794, between the United States and Great Britain, were not donations, and did not disqualify a settler from receiving a donation under the Act of May 15th, 1820, and of March 3rd, 1823."

Harden v. Fisher, 1 Wheaton 300, 302; 5 Curtis Decisions of Supreme Court of U. S., 560, 561, *(1816)*:

(C. J. Marshall): "What British subjects holding lands in the United States must show under the Treaty of 1794, Article nine, so as not to be considered as aliens in regard to lands held by them in the United States."

Hughes v. Edwards, 9 Wheaton, 489, 496; 6 Curtis Decisions of Supreme Court of U. S., 146, 150, *(1824)*:

The title of alien mortgagee is protected by the treaty of 1794, etc.

*(Approves **Harden v. Fisher,** and **Orr v. Hodgson.**)*

Judge Washington said:

"This objection would not, we think, avail the appellants, since the remedies, as well as the rights of

these aliens, are completely protected by the treaty of 1794."

Denn ex. Dem. Fisher v. Harden, 1 Paine Circuit Court 55, Rep. of United States *(1812)*:

Reversed on appeal in 1 Wheaton Rep. 300; 5 Curtis Decisions Supreme Court 560 *(1816)*—where court found that plaintiff held title to the land in question at date of treaty of 1794.

(See same case above under *Harden v. Fisher.)*

Jackson ex Dem. v. Augustus Porter, 1 Paine Circuit Court Reports of United States, 457, *(1825)*;

This case discusses boundaries of a post under *Article 2* of the Jay Treaty of 1794.

The Court said:

"Articles 2 and 9 of the 1794 Treaty were meant to protect legal and equitable interests in land and not trespassers and intruders without rights."

Judge Thompson, at pages 481, 482, 483, referring to the Jay Treaty of 1794, said:

"The 2nd and 9th Articles have been referred to. The Treaty applies to the title whatever it is, and gives it the same legal validity as if the parties were citizens."

The Society for the Propagation of the Gospel, etc., v. Wheeler, et al., 2 Gallison Circuit Court Reports of United States, 105, Fall Circuit Court of United States, New Hampshire, Oct. Term, *(1814)*, at Exeter:

Part of this decision falls under the Jay Treaty of 1794. Speaking of Article 9, Judge Story at page 135 says:

"This article has never been annulled, and therefore remains in full force. It deserves and ought to receive a liberal construction."

See Judge Story at page 127, lines 6 on, where he refers to Article 9 of Treaty as overruling defendant's argument that the Gospel Corp. can not sue on account of alienage.

In the case of *Martin v. Hunter's Lessee*, 1 Wheaton, 304, 360, 368, 370; 3 Curtis Decisions of Supreme Court of U. S., 584, 588, 589 *(1816)*, Judges Story and Johnson refer to the Treaty of 1794 as being then in existence and of binding force, Mr. Justice Johnson holding, at page 370, that:

"THE TREATY OF 1794 HAD BECOME THE SUPREME LAW OF THE LAND * * * THE MAJORITY OF THE COURT DETERMINED THAT, AS A PUBLIC LAW THE TREATY WAS A PART OF THE LAW OF EVERY CASE DEPENDING IN THIS COURT."

The Opinion of the District Court.

Justice Hazel, in his opinion, at folio 113 of the record herein, in referring to the Respondents herein, makes the following statement:

"That they are 'immigrants' is plainly apparent from the definition which Congress gives the term. Title 8, Chap. 6, sec. 203, U. S. C. A., and the exception (sub. 2) does not mean that a daily workman or employee of the alien class, retaining his residence in foreign contiguous territory, is permitted to pursue an ordinary vocation for a wage, or that he comes here temporarily for business, trade or commerce."

The conclusion that the Respondents are "immigrants" within the purview of the Act of Congress can only be arrived at by assuming the correctness of the Court's construction of the words "temporarily for business", which the Court defines as follows:

> "To come for business, within the meaning of the statute, indicates a temporary purpose to engage in a business transaction, as that of a merchant, or one engaging in traffic or trade. Congress did not use the word 'business' in its broadest sense, or in a sense including daily labor or an occupation, trade, or calling for hire. It had in mind a restriction of the broad term 'business', as is clearly manifest from the general scope and purpose of the act."

In attacking this definition we refer now to the definition of the word "business" in its *narrower sense* as signifying "*a calling for the purpose of livelihood or profit*", as cited previously in the brief and defined in *Estabrook v. Hebrew Ladies Orphan Asylum*, 82 Atl. 561 at page 563, 85 Conn. 289, 41 L. R. A. (N. S.) 615.

In construing a statute, the practical interpretation thereof previously given by the Department effected is in itself one of the guides of construction. This medium does not need the support of authorities before this Court.

Until December 1st, 1927, the interpretation of the word "business" as used in Act of Congress (8 U. S. C. A. §102) *was adopted by the Department of Labor itself.*

This interpretation up to now has conceded to British subjects the border crossing-commuting privilege pursuant to the words "temporarily for business", *as otherwise there would have been no necessity for the promulgation of General Order 86.* If the Court below correctly construed

the section, the promulgation of General Order 86 was unnecessary and superfluous because it was the law already. Yet, in practical effect, it is keeping hundreds of British subjects in Canada *who have previously crossed and recrossed at will.*

The Court inadvertently assumed also in the last line of folio 115 and in folio 116 of the record herein, that the Respondent Cook alone is a subject of Great Britain, by implying that the Respondent Dancion is not. As the record will disclose, both are subjects of Great Britain, and are carefully protected by the terms of the Jay Treaty of 1794, if the Treaty has not been abrogated.

We take exception to the reasoning of the Court in folios 117 to 119 of the record herein, because it seems to counsel that the Court interprets the provisions of the Treaty not as they stand, but in connection with the rule, the very validity of which we are attacking. He states:

> "Though the Jay Treaty, it is strongly urged, protects Miss Cook from exclusion, I nevertheless, assuming Art. 3 to be still in force, think that it cannot be considered as including British subjects not born in Canada, *whose status is that of immigrants* and who seek to cross the border solely to labor here or to seek employment at trades or avocations without establishing a domiciliary status, as provided by the Immigration Act of 1924. The relators were not passing from one country to another to carry on trade or commerce, as those terms are ordinarily understood, but, as pointed out, simply to work for a daily wage, crossing back to their homes in Canada in the evening and returning in the morning, and such free passing and repassing was not contemplated by the Jay Treaty or by Congress in the enactment of the Immigration Act."

By the very words, "whose status is that of immigrants", the Court is assuming an interpretation of the

Jay Treaty which negatives the conclusion that British subjects may pass to and fro without acquiring the status of immigrants, and, on the contrary, assumes that General Order 86 is valid in classifying them as immigrants, and assumes that any British subject desiring to cross the border temporarily for business is *properly* classified as an immigrant, which while consistent with his conclusion, folios 113-114 of the record herein, we respectfully urge, is not the law.

We further submit that the District Court erred in stating that the Respondents were not passing from one country to the other to carry on trade and commerce, as the terms are "ordinarily understood". We claim the right of the Respondents in this case is based on the right to enter the country "temporarily for business" as non-immigrants, as provided in the immigration act and upon their right to "cross and recross" the border as British subjects, in accordance with the provisions of Article 3 of the Jay Treaty. The right under the Treaty we contend is to "cross and recross" without restriction. To carry on trade and commerce is an additional right granted these British subjects.

Again the District Court states, in folio 119 of the record:

> "I conclude that order No. 86 is a valid regulation and requires that the relators, before entering, must have an immigration visa, and that they come from contiguous territory to seek employment or to work for a wage, does not change their classification as immigrants."

We respectfully submit that because they do come to seek employment or to work for a wage does according to the District Court's opinion change their status from that

of non-immigrants to immigrants, and makes them immigrants *merely because they seek work*. This we contend is erroneous.

We respectfully submit that the Petition should therefore be denied.

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Amicus Curiae, on the brief for the Respondents.

JULY, 1928.

Charles D. Council
of Counsel for the Respondents

OPPOSITION

BRIEF

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 198.

ARTHUR J. KARNUTH, UNITED STATES DIRECTOR OF IMMIGRATION, and CHARLES DREHER, INSPECTOR IN CHARGE, UNITED STATES IMMIGRATION SERVICE. *Petitioners,*

v.

UNITED STATES OF AMERICA, on the Petition of PRESTON M. ALBRO, an Attorney, for MARY COOK and ANTONIO DANELON.

Brief in Opposition to Petition for Rehearing of Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

So far as the legal questions involved in this application and in the original petition for a writ of certiorari are concerned, the respondents are content to rest upon the unanimous opinion herein of the Circuit Court of Ap-

peals and upon the authorities submitted to this Court in the brief in opposition to the petition for a writ of certiorari.

The petition herein, however, contains certain statements, which, in view of the facts conceded in the brief heretofore filed by the petitioners, we respectfully submit, should be called to the attention of the Court.

The original brief, prepared by the Solicitor General, contained this statement, in referring to the Immigration Act of 1924, from which we quote from page 9 of their brief:

> "For nearly three years after that Act was passed, aliens residing in Canada were allowed to cross daily to work, on the theory that they were not immigrants."

and again at the bottom of page 11:

> "It must be admitted that the decision below has much to support it, and the fact that the Department of Labor so construed the Act of 1924 from its passage until April 1, 1927, is not to be overlooked."

Now, on page 4 of the petition herein, it is stated:

> "As a consequence of the decision as it now stands it is respectfully pointed out that not only British subjects of the white and black races, but also of the Oriental races, can enter Canada and immediately gain admission to the United States for practically an indefinite period without regard to the immigration laws which forbid the admission as immigrants of persons ineligible for citizenship. In fact, it follows that persons of any nationality must be admitted to the United States under this decision without regard to the immigration laws so soon as they become lawfully domiciled within Canada and thereby become British subjects."

The statement, which we have just quoted, it seems to us, fails to take into consideration three important

facts, the first being that, under the recent decision of this Court in *Nagle, Commissioner of Immigration v. Loi Hoa, decided on January 3rd, 1928, Supreme Court Reporter Advance Sheets, February 1st, 1928, page 160,* the Court seems to definitely hold that within the meaning of the Immigration Act (particularly referring to the Chinese Exclusion Act), the word, "subject," is given a narrower construction that that applied in the Pizzarro case, 2 Wheaton, 227, and refers to persons owing permanent allegiance and not to persons merely domiciled within a country but still owing permanent allegiance to another sovereignty; second, it fails to call to the Court's attention the fact that Canada itself has immigration laws which prevent the entry of Chinese and even races themselves subject to Great Britain; third, the decision of the Circuit Court of Appeals in no way prevents the promulgation by the Secretary of Labor and the Commissioner General of Immigration of any rule consistent with the Immigration Act of 1924 and the Treaties of the United States which will define, limit or give a reasonable construction to that which constitutes a "temporary visitor."

The authorities submitted in the original brief of the respondent seem to us to hold beyond any possible doubt that Article III of the Jay Treaty of 1794, declared by supplemental treaty of 1796 to be permanent, is in force. The petitioner seeks to cast a doubt upon this decision by referring to the provisions of the Treaty of Ghent of 1814, and, in reply to this, we would simply call the Court's attention again to the holding in *Society for the Propagation of the Gospel in Foreign Parts v. Town of New Haven, 8 Wheaton, 464, 5 Law Editions U. S. Reports 662.* In this case, the United States Supreme Court in the year 1823 had occasion to consider the effect of the War of 1812 on

the Treaty of Peace of 1783 and the Jay Treaty of 1794, and also considered the effect of the Treaty of Ghent of 1814 and this Court decided that the Jay Treaty of 1794 was not affected by any of the other treaties because it was a stipulation of permanent rights and was only suspended during the War of 1812.

Further, in the year 1842, the Webster-Ashburton Treaty was entered into between Great Britain and the United States, and, in this Treaty, the Jay Treaty of 1794, the first ten clauses of which are in express terms declared to be permanent, is incorporated and made a part of the 1842 Treaty for the purpose of finally determining and settling the boundary between territory of Great Britain and the United States in North America under the Treaty of Peace of 1783 and the Jay Treaty of 1794 and under the Treaty of Ghent of 1814. (See Malloy, Vol. 1, page 620.)

It is further undisputed that the United States and Great Britain have acquiesced in the crossing and recrossing privileges under the Jay Treaty and they have been acted upon and in operation with full knowledge of both nations, without objection, ever since the year 1794 down to and including the passage of General Order No. 86 on April 1st, 1927.

The Solicitor General, referring to the Jay Treaty of 1794, states at the bottom of page 2, and at the beginning of page 3 of the petition for rehearing, that:

> "In view of the fact that mutual rights were granted by Article III to British subjects and American citizens, as well as to Indians dwelling on either side of the border, it reasonably might appear that any question regarding whether the treaty is in force and effect is a political and not a judicial one. * * ***

and again on page 11 of the petition for rehearing, in referring to the same matter as above mentioned, he stated in the second paragraph on this page:

> "Furthermore, if the Circuit Court of Appeals is correct in holding that these aliens are admissible under the statutory exception relating to aliens coming to the United States temporarily for business, the court need not have decided whether the Treaty of 1794 was in force and effect and should have left that matter to the decision of the political branch of the Government."

We respectfully submit that the political branch of the Government has already passed upon this question and decided that the Jay Treaty is in full force and effect. Under date of March 17th, 1919, the Hon. William Phillips, then Acting Secretary of State of the United States, transmitted to the Senate a letter in response to a resolution passed by the Senate directing the Secretary of State to furnish the Senate with complete information concerning, "The countries with which the United States has Treaties which prevent us from giving preference to Americans or American ships in the carrying of imports or exports, and what is necessary to be done to abrogate such Treaties, and what, if any, steps our Government has taken to secure the abrogation of the same." From this letter we quote:

> "The Acting Secretary of State transmits to the Senate herewith a memorandum prepared in the Department of State in response to the resolution quoted above. It is hoped that this memorandum will contain the information desired by the Senate."

The Jay Treaty of 1794 is then copied in full and appears in Volume 14, pages 5, 18 and 19 of the Senate Documents of the 66th Congress of the United States, first session 1919. The then Acting Secretary of State then states with regard to the Jay Treaty of 1794 and Article III thereof:

> "*The Treaty from which the above quoted Article*

is taken contains no provision for abrogation; hence, agreement by the parties thereto would seem to be necessary effectively to accomplish its abrogation as an international agreement. No action has been taken by either government looking to abrogation.''

The resolution above referred to, and the letter and other documents quoted from the Acting Secretary of State, seem to show that the political department of the Government has already determined that the Jay Treaty of 1794 is still in full force and effect.

We further respectfully submit that the petition for a rehearing herein should be denied.

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